DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW

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General Report

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I
INTRODUCTION

The topic of declining jurisdiction in private international law is one of enormous practical importance and academic interest. It is also a topic where a comparative approach is particularly revealing, not only as to differences between the common law and civil law worlds but also as between one common law jurisdiction and another, and as between one civil law jurisdiction and another. Before making these comparisons, a few words need to be said about what is meant by 'declining jurisdiction' and about the scope of the present inquiry.

The phrase 'declining jurisdiction' refers to the situation where a court which has jurisdiction refuses to exercise it. This is a situation with which lawyers from both common law and civil law jurisdictions are familiar.[1] It is to be distinguished from the situation where the rules on jurisdiction are not satisfied and a court therefore dismisses the action on the basis that it has no jurisdiction. Of course, in both situations, the result is the same: the court refuses to try the action.

It is well known that in many States a court may decline to exercise jurisdiction/or assert that it has no jurisdiction on the basis of *forum non conveniens* (i.e. the appropriate forum for trial is abroad or the local forum is inappropriate) or *lis pendens* (i.e. parallel proceedings involving the same parties and cause of action are continuing in two different States at the same time). The rules in relation to both these doctrines will be examined in sections III and IV of this chapter. However, a court may also decline jurisdiction/assert that it has no jurisdiction because of a foreign choice of jurisdiction agreement or arbitration agreement. The rules in relation to such agreements also merit attention and are examined in sections V and VI. Finally, the closely related problem of forum shopping abroad, and how this can be discouraged, will be examined in

[1] There is a difference between the terminology used by English judges, who stay proceedings, and US judges, who either suspend or dismiss proceedings on conditions. The effect is the same, in that the plaintiff is forced to go to a foreign forum for trial. In civil law jurisdictions, and in conventions based on civil law concepts, a stay of proceedings may refer, not to declining jurisdiction, but to suspending proceedings pending a decision of a foreign court.

section VII. One limitation on the scope of the present enquiry, though, is that it is confined to 'civil and commercial matters'. This term is a familiar one to lawyers in Western Europe, for it defines the scope of the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)[2] and the parallel EC/EFTA Convention (the Lugano Convention).[3] It means, for example, that family law matters are, for the most part, excluded.

II
THE JURISDICTIONAL BACKGROUND

Jurisdiction, used in its widest sense, refers to the question whether a court will hear and determine an issue upon which its decision is sought. Before turning to look at the question of declining jurisdiction, something needs to be said more generally in relation to the rules determining when the courts of different States have jurisdiction.

1. Sources of the Rules

There is a wide variety of sources of rules on international jurisdiction. These may be contained in a code, as in the case of Greece and Quebec (which has recently introduced the new Civil Code of Quebec). They may be contained in a statute, as in the Swiss Private International Law Statute of 1987, or in a multilateral convention. The Brussels and Lugano Conventions are well known examples of such multilateral conventions. Alternatively, and less commonly now in Europe, the source may be a bilateral convention, such as the Swiss/Liechtenstein Treaty of 1968. With all these sources case law will have an important role in interpreting the statutory, code, or treaty provisions. However, it is not unknown for the sole direct source of a State's rules on international jurisdiction to be case law. This is the position in Japan, where there are no explicit statutory provisions on international jurisdiction.

In many States there is more than one source. In the United States, Australia, and New Zealand, there are some bases of jurisdiction derived from case law, whereas other bases are derived from statute. In England,

[2] See Art. 1 of the Brussels Convention. The original Convention has been amended by three Accession Conventions, see [1978] OJ L304/1 (and at 77 for an amended version of the original Convention); [1982] OJ L388/1; [1989] OJ L285/1. All references to the Brussels Convention refer to it as amended by these three Accession Conventions.

[3] See Art. 1 of the Lugano Convention, [1988] OJ L391/9. Of the EFTA States, Finland, Norway, Sweden, and Switzerland have ratified it. Austria and Iceland have still to do so.

there are three different sources for bases of jurisdiction: case law, procedural rules (the Rules of the Supreme Court), and statutes (implementing the Brussels and Lugano Conventions). Under Belgian law, general rules on international jurisdiction are set out in the *Code judiciaire*, the *Code civil*, and in special acts and treaties ratified in Belgium. French law on jurisdiction is also derived from a number of sources: provisions in the *Code civil* and *Nouveau Code de procédure*, a large body of case law, and International Conventions.

Rules as to jurisdiction may be directly derived from these sources, but they can also be indirectly derived from internal venue provisions. Thus under Swedish law there are special statutory rules (derived from the Lugano Convention) plus general rules derived from the local competence of Swedish district courts. The position is similar in Germany and in The Netherlands where there are statutory and convention rules, plus rules on international jurisdiction derived from rules on internal venue. Japanese cases have based jurisdiction on the venue provisions set out in the Code of Civil Procedure, although there is a debate over whether all these internal provisions reflect the principles on international jurisdiction.

2. Diversity

There is a tremendous variety in the bases of jurisdiction adopted in different States. Starting with common law jurisdictions, there are clear similarities between Britain and other States which historically have come under British influence. England, Australia, New Zealand, Canada (common law jurisdictions), and Israel all base jurisdiction on the service of a writ on the defendant. This can be done where a defendant is transiently present within the jurisdiction. In certain specified circumstances a writ can be served out of the jurisdiction. For instance, is allowed under English law where, in a contractual dispute, the contract is governed by English law.[4] United States law, though, is distinctively different. Nearly all States have long-arm statutes which set out when process may be served on non-resident defendants. However, this jurisdiction is subject to constitutional limits set out in the due process clause of the United States Constitution. As a response to this, some long-arm statutes provide that jurisdiction may be exercised on any basis not inconsistent with the State or United States Constitution.[5] Many long-arm statutes, though, detail the circumstances in which jurisdiction can be asserted over a non-resident defendant. Typically, jurisdiction is allowed where there has been 'the transaction of any business' or 'the commission

[4] Ord. 11, r. 1(1)(d)(iii) of the Rules of the Supreme Court.
[5] See e.g. California Code of Civil Procedure, § 410.10 (1991).

of a tortious act' within the State.[6] The United States Supreme Court allows general jurisdiction over any claim against the defendant whenever there are continuous and systematic activities by the defendant within the forum or the defendant is physically present in the forum and served with process. It also allows specific jurisdiction in relation to claims that arise out of the defendant's activities within the forum; in such cases a minimum contacts test is applied.

Moving on to civil law jurisdictions, the same pattern of different rules in different States emerges. Under Belgian law a plaintiff is allowed to proceed in Belgium if the defendant is domiciled or resides in Belgium.[7] A second provision allows a plaintiff to proceed if there is a specified territorial connection with Belgium, such as this being the place of performance of an obligation.[8] Under a third provision a plaintiff may sue in Belgium if he has a domicile or a residence in that State.[9] However, the defendant is allowed to decline this jurisdiction. Under the well-known Article 14 of the French Civil Code a French national is able to bring an action in France against a foreign defendant. In contrast, under German law there is the notorious basis of jurisdiction that the defendant has property in the forum.[10] Swiss law has a general rule on jurisdiction whereby jurisdiction lies with the Swiss judicial or administrative authorities at the defendant's domicile.[11] There are then special rules for particular types of case. For example, for contracts the action may be brought before the Swiss court for the place of performance of the contract.[12] Under Article 3 of the Greek Code of Civil Procedure of 1968 the Greek courts have international jurisdiction when they have territorial jurisdiction.

The position is different in Scandinavian States. There is jurisdiction in Sweden if the defendant is habitually resident or has its seat there. There are also particular rules for special types of dispute. Thus, in disputes concerning debt obligations, a non-domiciliary may be sued at the place where property belonging to him is located. An action for damages in tort may be brought in Sweden if this is the place in which a tortious act occurred or had its impact. Finland takes a very wide jurisdiction based on 'catch where you can' and on the presence of property in the forum.

3. *Forum Conveniens*

Although there is considerable diversity in the rules on international jurisdiction in different States, one theme that keeps on occurring is that of

[6] See the Illinois long-arm statute, Ill Rev. Stat. Ch. 100, § 2.209 (1983).
[7] Art. 635, 2° of the *Code judiciaire*.
[8] Art. 635, 3° of the *Code judiciaire*.
[9] Art. 638 of the *Code judiciaire*.
[10] S. 23 ZPO (Code of Civil Procedure).
[11] Art. 2 of the Swiss Private International Law Statute of 1987.
[12] Art. 113 of the Swiss Private International Law Statute of 1987.

forum conveniens. *Forum conveniens* can be defined as a court taking jurisdiction on the ground that the local forum is the appropriate forum (or an appropriate forum) for trial or that the forum abroad is inappropriate. It is a positive doctrine, unlike the doctrine of *forum non conveniens*, which is a negative doctrine concerned with declining jurisdiction.

This raises the question: what are the relevant factors when identifying the appropriate forum? Under English law the concept of appropriateness involves looking at connecting factors 'and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction . . . and the place where the parties respectively reside or carry on business'.[13] Ultimately, the object is 'to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice'.[14]

A concern with *forum conveniens* manifests itself in a variety of different ways, depending on which State one is looking at. These are set out below:

(a) A DISCRETIONARY RULE

This is a feature to be found in many, but not all, common law jurisdictions. Thus an English court is empowered under its non-convention rules on jurisdiction to permit service of a writ out of the jurisdiction on a foreign defendant under Order 11, rule 1(1), of the Rules of the Supreme Court. The court has to be satisfied that there is a serious issue to be tried, that one of the heads of rule 1(1) applies, and that the discretion should be exercised to allow service out of the jurisdiction.[15] The criterion for the exercise of this discretion is that of *forum conveniens*. The plaintiff has to show that England is the clearly appropriate forum for the trial.[16]

A number of other Commonwealth common law jurisdictions, for example Singapore, proceed in the same way as England. However, in New Zealand, Australia, and Canada there has been a movement towards allowing service of a writ out of the jurisdiction without permission. Thus in New Zealand, Rule 219 of the High Court Rules allows service without leave where the parties or the cause of action have a specified connection with New Zealand or New Zealand law. Rule 220 allows service with leave where the court considers New Zealand *forum conveniens*. In most jurisdictions in Australia no leave is required prior to service of the writ,

[13] *Spiliada Maritime Corp* v. *Cansulex Ltd* [1987] AC 460 at 478. [14] *Ibid.* 480.
[15] *Seaconsar Far East Ltd* v. *Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438.
[16] *Spiliada Maritime Corp* v. *Cansulex*, n. 13 above. In Australian cases of service out of the jurisdiction, irrespective of whether leave is required for this or not, the onus is on the plaintiff to show that the chosen forum is not a clearly inappropriate one.

although leave must be obtained at the hearing if the defendant fails to appear.[17] In Canada five out of nine common law provinces and two territories now allow service out of the jurisdiction without leave if the case comes within one of the relevant heads, and a further two provinces have abolished the list of heads altogether and allow service out of the jurisdiction without leave in any type of case if the person to be served is resident in Canada or the United States.[18] The upshot is that in New Zealand, Australia, and Canada the *forum conveniens* discretion has decreased in importance. Nonetheless, appropriateness can still be considered at the stage after the writ has been served using the doctrine of *forum non conveniens*.

In contrast to the position in Commonwealth States, in the United States there is no *forum conveniens* discretion.

(b) A RULE OF CONSTRUCTION

A German court in a well known decision[19] has, by means of a rule of statutory construction, introduced a requirement of a 'sufficient connection' between the litigation and the forum State in cases where jurisdiction is founded on the presence of the defendant's property in the forum. This requirement introduces one of the main considerations to be taken into account under *forum conveniens*.

(c) AN EXPRESS REFERENCE

Some States have adopted jurisdictional bases which expressly refer to considerations of appropriateness. A good example is Article 3136 of the Civil Code of Quebec which provides jurisdiction 'if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required'.

Many civil jurisdictions in Europe have also adopted *forum conveniens*-type jurisdiction rules. Thus, under French law, a judge is able in two situations to rule on a case, not because of a precise rule giving him competence but because he thinks it is appropriate to do so.[20] The two situations in question are, first, where there would otherwise be a miscarriage of justice and, secondly, where the dispute deals with measures of

[17] See Nygh, *Conflict of Laws in Australia* (5th edn. 1991), 39.

[18] There is now a constitutional limit on the jurisdiction of Canadian courts. This is narrower than the doctrine of *forum non conveniens* and is based on minimum standards of order and fairness in intra-Canadian jurisdiction: see *Hunt* v. *T. & N. Plc* (1993) 109 DLR (4th) 16.

[19] BGH, 2 July 1991 (XIth Civil Senate), 115 BGHZ 90.

[20] See below, p. 176.

execution to be performed in France and the judge decides that it is right to determine some underlying question (such as the existence of the debt which justifies the measure of execution). German law has, like Quebec, adopted the concept of *forum conveniens* in the rare case of a negative conflict of competence.[21] The court asserts jurisdiction by necessity if there is an urgent interest in granting domestic legal protection. But the domestic forum has to be positively convenient. Belgian case law also operates a doctrine of jurisdiction by necessity, which has been used in favour of Belgian claimants in family law cases. Dutch courts have from time to time filled in gaps in their rules as to jurisdiction by adopting a concept of *forum necessitatis*. Thus in one case jurisdiction was taken where the deceased had no domicile in The Netherlands but had a major connection with The Netherlands (this was where the estate was located and the heirs were domiciled).[22] Of greater impact in the future, under a Dutch draft bill amending the Code of Civil Procedure, in petition cases (e.g. a dispute over the management of a corporation) a Dutch court will have jurisdiction if the petitioner is domiciled in The Netherlands or the case is otherwise sufficiently connected with the legal sphere of The Netherlands. Moreover, *forum necessitatis* is now explicitly mentioned as constituting jurisdiction. Swiss law has shown some concern that the forum abroad should not be inappropriate. Thus it provides for a subsidiary jurisdiction in cases where a Swiss citizen lives abroad and the action cannot be brought at the regular forum abroad, for example because the foreign courts are not impartial.[23]

This type of provision can also be found in Scandinavia. Under the law of Finland, a court may hear the case in Finland, if litigation abroad would involve extreme injustice and costs for the Finnish party.

Such explicit provisions are exceptional; what is much more common is that in many States appropriateness is seen as the underlying basis of their rules on jurisdiction.

(d) THE UNDERLYING BASIS OF JURISDICTION

Under French law jurisdiction is said to be based on proper administration of justice and the interests of litigants.[24] The Belgian rules on international jurisdiction are largely based on the common principle of the jurisdictional protection of the foreign defendant.[25] Similarly, the Greek law of jurisdiction is said to take account of all the public and private interests involved and to allocate jurisdiction to the appropriate forum in

[21] See below, p. 193. [22] HR, 26 Oct. 1984, [1985] NJ 696.

[23] See e.g. Arts. 43(2), 47, 60, 67, 76, 80, 87 of the Swiss Private International Law Statute of 1987.

[24] See below, pp. 177–8. [25] See below, p. 103.

each case.[26] Swiss law bases jurisdiction on a strong connection with the forum. There is no jurisdiction on the basis of the simple presence of the person or mere location of property. Argentinian law has strict rules of jurisdiction related to the territory, parties, and the subject of the claim. German law is based on standardized jurisdictional interests.[27] Under Japanese law it is accepted that international jurisdiction has to be decided in accordance with those principles of justice which would require that fairness be maintained between parties, and a proper and prompt trial be secured. It is also believed that the internal venue provisions, or at least some of these provisions, contained in the Code of Civil Procedure reflect these principles, and can therefore operate as a basis of jurisdiction. Under the Brussels and Lugano Conventions jurisdiction is always allocated to an appropriate forum.[28] The bases of jurisdiction set out in these two conventions all require a close connection with the forum. Normally, the plaintiff is expected to bring the action in the State of the defendant's domicile.[29] Special jurisdiction under Article 5, which provides for trial in a State other than that of the defendant's domicile, has frequently been justified by the European Court of Justice on the basis that it allocates jurisdiction to a Contracting State with which the dispute has a particularly close relationship.[30]

It is worth pointing out, though, that there are different perceptions in different States as to when the local forum is an appropriate one for trial. Thus under Article 5(3)[31] of the Brussels and Lugano Conventions a Contracting State has jurisdiction on the basis of a person being injured in that State. In common law jurisdictions this connection, on its own, is not sufficient to found jurisdiction. There can be differences, too, in relation to how appropriate a local forum must be before it has jurisdiction. The bases of jurisdiction, mentioned above, in the Brussels and Lugano Conventions are, in effect, concerned with allocating jurisdiction to *an appropriate forum*. English courts, when assuming jurisdiction under Order 11 of the Rules of the Supreme Court, are concerned that England is *the clearly appropriate forum*.

4. Harmonization

There have been notable successes in harmonizing rules as to jurisdiction in the European Community and EFTA bloc under the Brussels Convention and the parallel Lugano Convention. However, these conventions do

[26] See below, pp. 239–40. [27] See below, p. 194.
[28] See Fawcett, (1991) 44 *Current Legal Problems* 39. [29] Under Art. 2.
[30] See e.g. Case 34/82 *Peters* v. *Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987.
[31] As interpreted by the ECJ in Case 21/76 *Handelskwekerij GJ Bier BV* v. *Mines de Potasse d'Alsace SA* [1976] ECR 1735.

not contain all the law on jurisdiction for Western European countries. They only apply to civil and commercial matters and, in broad terms, require the defendant to be domiciled in a European Community or EFTA State. In other cases each Western European State will apply its traditional national rules on jurisdiction. It is interesting to note, though, that in some of these States, for example Spain and, to a lesser extent, Scotland, traditional rules have been amended to bring them into line with the Brussels Convention.

III
FORUM NON CONVENIENS

1. The Overall Picture

As has been seen, *forum non conveniens* can be defined as a general discretionary power for a court to decline jurisdiction on the basis that the appropriate forum for trial is abroad or that the local forum is inappropriate.

The common law jurisdictions of Britain, New Zealand, Canada, Israel, and the United States have all adopted a doctrine of *forum non conveniens*, as has the hybrid jurisdiction of Quebec. Japan, although a civil law jurisdiction, has a 'special circumstances' doctrine which bears a resemblance to a doctrine of *forum non conveniens*. Sweden has some general discretion in relation to jurisdiction. In contrast, the civil law jurisdictions of Belgium, France, Germany, Switzerland, Italy, Greece, and The Netherlands have no such general discretionary power to decline jurisdiction. If one turns to the position in Scandinavia, Finland also has not adopted this doctrine: moving to Latin America, nor has Argentina.

The rest of this section will be subdivided to look, first, at the position in States which have adopted a doctrine of *forum non conveniens* and, secondly, at that in States which have not adopted such a doctrine.

2. *Forum Non Conveniens* States

The position in States which have adopted a general discretion to decline jurisdiction is complicated by the fact that there is no single doctrine of *forum non conveniens*. Instead, States tend to have their own version of it. The position can best be understood by dividing up the law districts which have adopted a general discretionary power to decline jurisdiction into five groups, and examining the position in relation to each group. The five groups are as follows: Britain and other States whose law has been influenced by British law; the USA; Quebec; Japan; and Sweden.

(a) BRITAIN AND OTHER STATES INFLUENCED BY BRITISH LAW

There are very close similarities between the doctrine of *forum non conveniens* applied in Britain and the doctrine of *forum non conveniens* applied in certain other States whose law is influenced by English and Scots law. Britain has led the way in introducing the doctrine of *forum non conveniens*. The leading case is *Spiliada Maritime Corp.* v. *Cansulex Ltd*,[32] which has had a major influence on the development of the doctrine in other Commonwealth States and in Israel.

(i) The British Lead

The House of Lords in the *Spiliada* case, following Scottish cases,[33] adopted the basic principle that

> a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[34]

Lord Goff then laid down a number of subordinate principles which set out a two-stage process. Under the first stage the burden is on the defendant who seeks a stay to show that there is another available forum which is clearly or distinctly more appropriate than the English forum. Where this cannot be shown, the courts will ordinarily refuse a stay of proceedings. Under the second stage, once it has been shown that there is a clearly more appropriate forum for trial abroad, the burden of proof shifts to the plaintiff to show 'circumstances by reason of which justice requires that a stay should nevertheless not be granted'.[35] The first stage is concerned with the appropriate forum; the second with considerations of justice (including the advantage to the plaintiff of trial in his chosen forum), which have become much less important over the years. The meaning of appropriateness is the same in the present context as that used in the context of *forum conveniens*, examined earlier.

Within a few months of the *Spiliada* decision an important restriction on the use of *forum non conveniens* by United Kingdom courts came into effect. This restriction arises in Brussels Convention cases.[36] This convention contains no general discretionary power to stay actions on the basis of *forum non conveniens*. It is accepted in the United Kingdom that, in cases

[32] N. 13 above. The HL accepted the existence of the doctrine in the earlier case of *The Abidin Daver* [1984] AC 398. In Scotland the leading HL case was *Société du Gaz de Paris* v. *SA de Navigation Les Armateurs Français*, 1929 SC (HL) 13.

[33] e.g. *Sim* v. *Robinow* (1892) 19 R (Ct. of Sess.) 665; *Société du Gaz de Paris* case, n. 32 above. The development of *forum non conveniens* in the US has also been influenced by Scottish cases.

[34] N. 13 above, at 476. [35] *Ibid.* 478.

[36] This restriction equally applies in relation to the more recent Lugano Convention.

where jurisdiction is founded on the Brussels Convention, it is not possible to use the doctrine of *forum non conveniens* to decline jurisdiction, at least in intra-EC cases (i.e. ones where the alternative forum to England is another EC State). However, in cases where the alternative forum is a non-EC State, the English Court of Appeal has held that it is still possible to use *forum non conveniens* to decline jurisdiction.[37] This decision, although it has its supporters in England, has been criticized for leading to a lack of harmonization of the law in Europe.[38] Of course, this restriction does not affect any of the other common law jurisdictions covered in the present survey.

(ii) Commonwealth Reaction

The *Spiliada* case has been followed in New Zealand[39] without any obvious difference; this has also happened in Brunei,[40] Hong Kong,[41] and Singapore.[42] It has also been followed in Gibraltar.[43]

The Canadian (common law jurisdictions) doctrine of *forum non conveniens*[44] is very similar to the British model. However, the two doctrines are not entirely the same. First, in Canada the two-stage analysis set out in *Spiliada* has not been followed. Instead, the consideration of the advantage to the plaintiff is part of the overall weighing of factors considered in identifying the natural forum. It is doubtful whether this would affect the outcome in any particular case. Secondly, there is some uncertainty in Canada over the burden of proof in cases where jurisdiction is founded on service of a writ out of the jurisdiction without the leave of the court. Third, in Canada the weight to be given to all the factors considered when ascertaining the appropriate forum may depend to some extent on whether the case is inter-provincial or international, although it is difficult to draw firm conclusions on this.

The High Court of Australia declined to follow the *Spiliada* case, and required there to be vexation or oppression for the grant of a

[37] *Re Harrods (Buenos Aires) Ltd* [1992] Ch. 72. The decision was originally referred to the ECJ (Case C–314/92 *Ladenimor SA* v. *Intercomfinanz SA*) but this has been removed from the register because the action has been settled. In a more recent case, the CA has refused to refer the same issue that arose in *Re Harrods* to the ECJ: *The Nile Rhapsody* [1994] 1 Lloyd's Rep. 382. This was because of the expense and delay that such a reference would occasion.

[38] See Cheshire and North, *Private International Law* (12th edn., 1992), 331–4. See also the French report, below, pp. 178–9; Duintjer Tebbens, in Sumampouw *et al.* (eds), *Law & Reality—Voskuil Essays* (1992), 47.

[39] *McConnell Dowell Constructors Ltd* v. *Lloyd's Syndicate 396* [1988] 2 NZLR 257; *Club Meditérranée NZ* v. *Wendell* [1989] 1 NZLR 216 (CA).

[40] *Syarikat Bumiputra Kimanis* v. *Tan Kok Voon* [1988] 3 MLJ 315.

[41] *The Adhiguna Meranti* [1988] 1 Lloyd's Rep. 384 (Hong Kong CA).

[42] *Brinkerhoff Maritime Drilling Corp* v. *PT Airfast Services Indonesia* [1992] 2 SLR 776.

[43] *Aldington Shipping Ltd* v. *Bradstock Shipping Corp and Marbanaft GmbH (The Waylink and Brady Maria)* [1988] 1 Lloyd's Rep. 475 (Gibraltar CA).

[44] See *Amchem Products Inc* v. *British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96.

stay.[45] However, in a subsequent case the High Court has established that this can be shown by the fact that the forum is a clearly inappropriate one for trial.[46] This formula is loaded in favour of trial continuing in the forum since, in practice, it is going to be harder to show that the local forum is a clearly inappropriate one than it is to show, under the *Spiliada* formula, that the alternative forum abroad is clearly more appropriate. Indeed, if you take the situation where the local forum is *an* appropriate one for trial, there can be no stay under the Australian formula, whereas a stay can still be granted under the *Spiliada* formula as long as the forum abroad is clearly more appropriate.

(iii) Israel

Israeli law on international jurisdiction is based on English law. Since 1980 Israeli case law has adopted the doctrine of *forum non conveniens*. The principles are set out in the very recent decision of the Supreme Court in *Abu-Ghichla* v. *The East Jerusalem Electric Co. Ltd* (not yet reported), decided in December 1993. This case adopts the two stage process set out in the *Spiliada* case. When it comes to the question whether dismissal of the action would cause injustice to the plaintiff, the Israeli Supreme Court followed the position common to both England and the United States that differences, for example, in the amount of damages awarded in the alternative fora do not constitute such injustice. There is, though, one very noticeable difference between the Israeli and the English doctrines. This relates to what are known under United States law as public interest factors. More will be said about these factors when United States law is examined below. Suffice it to say now that, under English law, public interest factors are considered only to a limited extent. Under Israeli law, though, the position remains open on whether the full range of public interest factors can also be considered. There are conflicting judicial statements on this. However, the most recent statement is from Shamgar P in the *East Jerusalem Electric Co* case (not yet reported) where the judge said: 'prima facie, I see no reason why, in Israel, it is not appropriate to consider public interests and even to give them weight, when the party interests are in equilibrium.' One more minor difference between the Israeli and English doctrines of *forum non conveniens* is that an Israeli court will not go into the question of the applicable law if this raises a difficult choice of law issue, whereas an English court is prepared to decide difficult choice of law points at this jurisdictional stage of the litigation.[47]

[45] *Oceanic Sun-Line Special Shipping Co Inc* v. *Fay* (1988) 165 CLR 197.

[46] *Voth* v. *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

[47] Compare the Israeli case of *Atiyah* v. *Arbatisi*, 39(1) PD 365 (1985), with the English case of *Metall und Rohstoff AG* v. *Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391.

(b) THE UNITED STATES

(i) Development of the Doctrine of *Forum Non Conveniens*

The common law doctrine of *forum non conveniens* has been developed by the Supreme Court of the United States. The trend has been for State courts to comply with the federal standard, with the result that the majority of States now recognize the doctrine. There are, though, some notable exceptions. Texas has abolished the doctrine in wrongful death and personal injury actions arising out of an incident in a foreign State or country.[48] The Louisiana courts rejected *forum non conveniens* but a subsequent statute allows for dismissal in limited situations which conform to the federal standard.[49]

Under the United States doctrine of *forum non conveniens* 'a court may decline to exercise its jurisdiction if the court finds that it is a "seriously inconvenient" forum and that the interests of the parties and of the public will be best served by remitting the plaintiff to another, more convenient, forum that is available to him'.[50]

The Supreme Court of the United States in *Gulf Oil Corp.* v. *Gilbert*[51] set out the private and public interest factors to weigh in determining whether a motion to dismiss on the ground of *forum non conveniens* is appropriate. The private interest factors include 'relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive'.[52] Public interest factors include administrative difficulties from court congestion; local interest in having localized controversies decided at home; interest in applying familiar law; avoidance of unnecessary problems in conflict of laws or in the application of foreign law; unfairness of burdening citizens in an unrelated forum with jury duty.

(ii) Similarities and Differences

The similarities between, on the one hand, British, and other Commonwealth States' *forum non conveniens* and, on the other hand, United States *forum non conveniens*, are as follows:

(i) It is an essential requirement for declining jurisdiction on the basis of *forum non conveniens* in Britain, other Commonwealth

[48] See *Dow Chemical Co* v. *Alfaro*, 786 SW 2d 674 (Tex. 1990), *cert. denied*, 498 US 1024 (1991). See also S. 71.031 of the Civil Practice and Remedies Code.

[49] LA Code Civ. Proc. Ann. Art. 123 (West Supp. 1989).

[50] Weintraub, *Commentary on the Conflict of Laws* (3rd edn., 1986), 213.

[51] 330 US 501 (1947). [52] *Ibid.* 508.

States, and the United States that there is an alternative forum abroad.

(ii) The considerations looked at in the United States as private interest factors would also be considered in Britain and other Commonwealth States when ascertaining the appropriate forum for trial.

(iii) The treatment of the advantage to the plaintiff in trial in the local forum appears to be the same. In *Piper Aircraft Co* v. *Reyno*[53] the Supreme Court of the United States held that the fact that Scots law was less favourable to the plaintiff was not a sufficient basis to defeat the dismissal on *forum non conveniens* grounds of an action brought in the United States. In the *Spiliada* case the House of Lords was concerned to reduce the weight that had previously been given to the advantage to the plaintiff of trial in England. Lord Goff held that this factor cannot be decisive and, by way of example, that an English court would not, in ordinary circumstances, hesitate to stay English proceedings merely because the plaintiff would be deprived of a higher award of damages in England.[54] Both England and the United States also have the same attitude towards time-bars in the foreign forum.[55]

(iv) The relationship with bases of jurisdiction is the same in the sense that, when an action is dismissed or stayed, what the court is saying is that, although it has jurisdiction, it refuses to accept jurisdiction. In the United States this means dismissing a case when what is constitutional is not desirable.

The differences are as follows:

(i) The framework within which the *forum non conveniens* considerations are examined in the United States is more flexible than that which operates in England, with its two-stage process and its rules on the burden of proof.

(ii) In the United States the courts expressly consider public interest factors. This does not happen in England, apart from when the applicable law is considered.[56] In so far as public interest considerations operate under the surface in English law they point towards a public interest in allowing trial in England, even where the dispute is essentially foreign.[57] This public interest is

[53] 454 US 235 (1981). [54] N. 13 above, at 482. [55] *Ibid.* 483–4.

[56] See Fawcett, (1989) 9 *OJLS* 205 at 220–1. The applicable law is a factor of both public and private interest under English law. The Australian position (in international as opposed to inter-State cases) is the same as the English in relation to public interest factors: see *Oceanic Sun Line Special Shipping Co Inc* v. *Fay* (1988) 79 ALR 9 at 50.

[57] Fawcett, n. 56 above, at 217–8.

founded on the economic benefits of England being a centre for international litigation. This is in direct contrast to the emphasis placed in the United States on the clogging of local courts by foreign litigants.

(iii) Following on from this, a United States court can of its own motion dismiss a case on the basis of *forum non conveniens*, whereas an English court cannot.

(iv) This can affect the weight to be attached in the United States to a forum selection clause which confers jurisdiction on the local court. Normally, this will operate as a strong factor against staying the local proceedings. However, if the court is acting on its own motion this private interest factor, whilst still relevant, is not given as much weight.

(v) A distinction is drawn in the United States between local plaintiffs and foreign plaintiffs. There is a presumption in favour of a local plaintiff's choice of forum, which will normally outweigh any inconvenience to the defendant.[58] There is no such presumption in the case of foreign plaintiffs.[59]

(vi) There is a clear distinction in the United States between international and inter-State cases. Moreover, a change of venue between federal district courts, which involves transfer rather than dismissal, is provided for under section 1404(a) of the United States Code. In Canada there are no such rules. However, in Australia there are cross-vesting provisions,[60] and the philosophy since 1987 is that Australia's States and Territories should be regarded as part of a common nation, and not as foreign law districts.

(c) QUEBEC

(i) Article 3135

Article 3135 of the new Civil Code of Quebec, in force since 1 January 1994, sets out a codified provision on *forum non conveniens*. This states that: 'Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.' Previous case law on the existence of a doctrine of *forum non conveniens* in Quebec was contradictory. Now there clearly is such a doctrine, although there is, as yet, no case law on the interpretation of

[58] *Koster* v. *Lumbermans Mut Cass Co*, 330 US 518 (1947).

[59] *Piper Aircraft Co* v. *Reyno*, n. 53 above.

[60] S. 5(2), Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); see Nygh, n. 17 above, 72–7.

Article 3135. Previous case law[61] suggests that the considerations taken into account when exercising this discretionary power to decline jurisdiction include the following: residence or domicile of the parties; presence of witnesses or evidence in Quebec; enforceability of the Quebecois judgment abroad; assets in Quebec in order to indemnify a victim; abuses of procedure; availability of an alternative forum; interests of the parties or of the child; forum familiar with the substantive law involved.

(ii) Similarities and Differences

On the one hand, Article 3135 employs a very flexible approach which is more reminiscent of the United States doctrine of *forum non conveniens* than the *Spiliada* case's formalized set of sub-principles and two-stage process. On the other hand, the considerations that it is suggested should be taken into account when exercising the Quebec discretion are essentially the same as those employed in Britain and other Commonwealth countries. In particular, most of the public interest factors, which are so important in the United States, do not come into play in Quebec.[62] At the same time, the Quebec doctrine has in common with both the United States and British/Commonwealth/Israeli doctrines the notion that, although the court has jurisdiction, it is refusing to exercise it.

(d) JAPAN

(i) The 'Special Circumstances' Doctrine

The Supreme Court, in the *Malaysian Airlines System* case on 16 October 1981,[63] laid down three general rules on international jurisdiction. First, there are no explicit statutory provisions on international jurisdiction in Japan. Secondly, international jurisdiction has to be decided in accordance with those principles of justice which would require that fairness be maintained between parties, and a proper and prompt trial be secured. Thirdly, although the provisions on distribution of venue among local courts are not concerned with international jurisdiction itself, they are believed to reflect the above principles.

The 'special circumstances' doctrine has been developed by the lower courts so as to add a fourth rule to these three general rules on international jurisdiction. It is concerned to ensure that the principles of justice, in accordance with which international jurisdiction has to be decided, are not violated; in other words, that 'fairness be maintained between parties, and a proper and prompt trial be secured'. The factors considered in Japan

[61] See below, pp. 154–5. [62] Quebec is concerned, though, with the applicable law.
[63] *Michiko Goto et al.* v. *Malaysian Airlines System Berhad*, 26 Japanese Annual of International Law 122 (1983).

when applying this doctrine are ones 'such as relative ease of access to source of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining evidence thereof, the enforceability of a judgment, and other relative advantages and obstacles to a fair, proper, and prompt trial'.[64]

(ii) Similarities and Differences

The Japanese 'special circumstances' doctrine bears an obvious resemblance to the United States doctrine of *forum non conveniens*. It adopts a flexible approach, and the considerations taken into account when applying the Japanese doctrine are very closely modelled on, indeed often identical with, the United States private interest factors. None the less, the Japanese doctrine does not take into account factors of public interest. Because of this, the Japanese doctrine can be said to be closer to the Quebecois than to the United States doctrine of *forum non conveniens*.[65]

However, it is important to note that the Japanese 'special circumstances' doctrine is distinctly different from all the doctrines of *forum non conveniens* outlined above in three important respects. First, there is no indispensable requirement that there be another more appropriate forum available abroad. Secondly, Japanese courts can only dismiss a case and have no power to stay[66] or dismiss an action subject to conditions. This hinders their ability to deal with cases flexibly. Thirdly, where an action is dismissed on special circumstances grounds, a Japanese court is saying that it has no jurisdiction, as opposed to saying that it has jurisdiction but is refusing to exercise it.

The upshot is that the Japanese 'special circumstances' doctrine is, strictly speaking, not a doctrine of *forum non conveniens*. However, it does bear an obvious resemblance to that doctrine and is accordingly considered in this part of the General Report rather than along with other civil law jurisdictions.

(e) SWEDEN

Swedish courts have a substantial margin of discretion in relation to jurisdiction which allows them to depart from the rules of local competence (on which jurisdiction is based) and dismiss a local action when the connection with Sweden is very weak. This probably requires that the defendant objects to Swedish jurisdiction as being unreasonably burden-

[64] See below, p. 310.

[65] For a comparision of *forum non conveniens* in England, Australia, and Japan see Hayes, [1992] *UBC L Rev.* 41.

[66] Except in situations where there are natural disasters or the unavailability of a party due to illness and the like.

some for him. While it is unclear whether the Swedish courts recognize the doctrine of *forum non conveniens*, their general discretion can be used for the same purpose.

(f) AN EXPLANATION

Some explanation is needed why certain States have adopted a doctrine of *forum non conveniens*, and why it is not always the same doctrine. This involves looking at the role of *forum non conveniens* in the different States in which the doctrine has been adopted. It can be regarded as fulfilling the following roles:

(i) The Antidote to Excessively Wide Bases of Jurisdiction

Forum non conveniens performs this role in Britain, Canada (common law jurisdictions), Israel, Quebec, and Japan. In England jurisdiction can be taken in cases of *in personam* jurisdiction on the basis of the transient presence of the defendant in England. In Scotland, owning immovable property in the forum is sufficient to found general jurisdiction against the owner in civil and commercial matters where the Brussels and Lugano Conventions do not apply. Jurisdiction is not being taken on the basis that the forum is *forum conveniens*. There is an obvious risk of injustice if jurisdiction is taken on such wide grounds. At its worst, one party may start an action, including a defensive action for a negative declaration, in a State which has been deliberately chosen because of its inconvenience to the other party.

The Canadian (common law jurisdictions) Reporter states that there are 'few occasions when a Canadian court is absolutely precluded from taking jurisdiction over an action. The discretion to decline jurisdiction has therefore become the means by which disputes as to jurisdiction are most often resolved in the common law jurisdictions of Canada'.[67] Similarly, in the Quebec legal system, although the presence of assets has recently disappeared as a basis of jurisdiction, there are, nevertheless, a number of wide bases of jurisdiction. There is jurisdiction if 'a fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec';[68] with such wide, although not necessarily exorbitant, bases of jurisdiction there is a role for *forum non conveniens* in Quebec as an antidote.

In Japan the adoption of the internal venue provisions contained in the Code of Civil Procedure as the criteria for international jurisdiction has had to be countered by the special circumstances doctrine which is concerned to obtain equity in individual cases in a flexible way.

[67] See below, p. 144. [68] Art. 3148–3°, Civil Code of Quebec.

(ii) Providing Flexibility

Bases of jurisdiction employed in common law jurisdictions are not only wide; they can also be crude, sometimes being based on a single, perhaps fortuitous, connection with the forum. Thus, jurisdiction can be invoked without leave of the court under the New Zealand long-arm provision (Rule 219 of the High Court Rules) on the basis that a contract was made in New Zealand or the proceedings concern a claim for damages for an act done in New Zealand. *Forum non conveniens* provides flexibility and allows the court to consider the wide, indeed unlimited, range of considerations which come within the themes of appropriateness and justice.

(iii) Without Excessive Uncertainty

In common law jurisdictions there are many reported cases on private international law. This is a feature of federal systems such as the United States, Canada, and Australia, and of major legal and commercial centres such as England. This has meant that there are numerous precedents explaining the doctrine of *forum non conveniens*, thereby providing a measure of certainty in its operation.

(iv) Preventing Forum-Shopping

The link between forum shopping and *forum non conveniens* is apparent in Canada (common law jurisdictions), where the advantage that the plaintiff obtains from trial in a Canadian forum is condemned if there is no real and substantial connection with that forum, but is regarded as a legitimate advantage where there is such a connection.[69] In the United States *forum non conveniens* has been used with some frequency to deny trial to foreign plaintiffs who forum-shop in the United States. The problem of forum-shopping is particularly acute in the United States, since there are obvious advantages to be obtained from trial in the United States (class actions, contingent fees, juries, higher damages including in many cases punitive damages, extensive pre-trial discovery), and very wide jurisdiction rules which allow trial.[70] It is against this background of forum-shopping that the concern, unique to the United States, with public interest factors, such as the unfairness of burdening citizens in an unrelated forum with jury duty, becomes understandable, as does the distinction drawn between local and foreign plaintiffs.

By way of contrast, there is no such problem of forum-shopping in Quebec, which only has about twenty private international law cases each year, and is very largely concerned under its doctrine of *forum non*

[69] See *Amchem Products Inc* v. *British Columbia (Workers' Compensation Board)*, n. 44 above, at 110.

[70] See generally Juenger, (1988/89) 63 *Tul. L Rev.* 553.

conveniens with private interest factors. In New Zealand forum-shopping is also no problem because of the geographical isolation of that State and because there are no obvious substantial advantages in suing in New Zealand over any other common law jurisdiction. Of course, the doctrine of *forum non conveniens* could be used to combat unacceptable forum-shopping in New Zealand, although it was not introduced for this purpose. Sweden is also said to be not popular with forum-shoppers.

(v) Avoiding Contradictory Judgments

In Quebec the doctrine of *forum non conveniens* is seen, like the doctrine of *lis alibi pendens*, which will be examined later, as preventing contradictory judgments from being delivered.

3. States Which have not Adopted a Doctrine of *Forum Non Conveniens*

When looking at the position in those States which have not adopted a doctrine of *forum non conveniens* two important issues need to be addressed. The first is the question why those States have not adopted a doctrine of *forum non conveniens*. The second is the extent to which those States have adopted substitutes for such a doctrine.

(a) Why no doctrine of *forum non conveniens*?

There are a number of reasons why States have not adopted a doctrine of *forum non conveniens*. Often it may be for more than one of these reasons.

(i) Open and Closed Systems

The Dutch reporters draw attention to the fact that, in broad terms, there are two alternative systems of control of jurisdiction. First, there is the closed system, under which the law of procedure strictly defines the cases in which the courts have jurisdiction, in principle leaving no room for judicial discretion. This is the system to be found in civil law jurisdictions. Secondly, there is the open system, under which there are broad and general rules of jurisdiction leaving the courts with a discretion whether to accept or decline jurisdiction. This is the system to be found in common law jurisdictions.

(ii) Appropriate Bases of Jurisdiction

More specifically, when discussing the jurisdictional background[71] it has been seen that, in many States, the rules of jurisdiction are such that they take into account the sorts of factors that are considered under a doctrine

[71] See above, pp. 7–9.

of *forum non conveniens*; if jurisdiction is taken on the basis of *forum conveniens*, there is no need for a doctrine of *forum non conveniens*.

(iii) No Problem of Forum-Shopping

In many States forum-shopping is not seen as being a problem; accordingly, there is no need for a doctrine of *forum non conveniens* to deal with this. Argentina, Finland, Germany, and Greece all come within this category. However, the precise reason forum-shopping is not seen as being a problem does differ, depending on the State in question. In Argentina the basis of jurisdiction normally coincides with the domicile of the defendant, which prevents persons from bringing actions in Argentina which have no connection with that State. In Germany, forum-shopping is said generally to be perfectly legitimate.[72] There is said to be no advantage in forum-shopping in Greece, and the rules on international jurisdiction deny an opportunity for this. In Finland, it is accepted that a person will have good reasons if that person sues in Finland.

In so far as forum-shopping is perceived to be a problem, many States believe it is better to deal with this by means other than a doctrine of *forum non conveniens*. The French rules on international jurisdiction guarantee, in principle, that a French court is not competent unless it has a strong link with the case. Under Japanese law, forum-shopping is dealt with at the stage of the rules on international jurisdiction and it is suggested that, in developing the law, the courts should be careful not to make rules which unduly favour certain categories of party.

A different way of tackling the problem of forum-shopping is by harmonizing choice of law rules. The German reporter sees harmonization of choice of law rules as being the most suitable answer to forum-shopping, rather than narrowing jurisdiction rules. There is support also from the Italian reporter for using choice-of-law rules to discourage forum-shopping. Moreover, there is a clear precedent for this within the European Community. One of the purposes of the Rome Convention on the law applicable to contractual obligations of 1980, which harmonizes contract choice-of-law rules in the European Community, is to inhibit the forum-shopping that the Brussels Convention allows.[73] However, it should be pointed out that the harmonization of choice of law rules will only stop forum-shopping for substantive law advantages, not for procedural advantages.

(iv) The Position of Judges

The position of judges is different in civil law jurisdictions from that in common law jurisdictions. In France, historically, the power of judges has

[72] For a similar English view see Slater, (1988) 104 *LQR* 554. See also Juenger, (1994) 16 *Sydney L Rev.* 5, the reply by Opeskin at 14 and the rejoinder by Juenger at 28.

[73] See the Giuliano and Lagarde Report, [1980] OJ C282/4–5.

been limited so that they are not used to exercising a flexible discretion. The Swiss legal system is not dominated by case law, or by law-making tribunals. There is a fear in Germany of capricious decisions by judges who, if given a wide discretion, may be tempted to get rid of troublesome foreign cases in the name of justice. Greek judges would rather try the case themselves than be accused of such behaviour.

(v) Absence of Cases

Many States lack the case law decisions on private international law which are so necessary to add flesh to the bare bones of a doctrine of *forum non conveniens*, and reduce the uncertainty when exercising the discretion. Sweden and Finland have few cases on private international law. The same is true in Switzerland and in Argentina. More generally, in common law jurisdictions, where much of the law on international jurisdiction is based on case law, it is probably easier to introduce a doctrine of *forum non conveniens* than in civil law States where jurisdiction is laid down by code, statute, or treaty.[74]

(vi) Constitutional Problems

In Germany, there are constitutional difficulties in introducing a doctrine of *forum non conveniens*. There is a constitutional commitment to guaranteeing the legally competent judge; this requires a predictable jurisdiction which must not be manipulated under any circumstances. Similarly, Greek courts are, seemingly, forbidden to take such an initiative under the Constitution. Under Italian law there is the right to adjudication before a court and judge predetermined by a general rule of law. This stems from a provision in the Italian Constitution stating that 'no one shall be denied the right to be tried by his natural judge pre-established by statute'.[75]

(vii) Certainty and Predictability

Civil law States are more concerned with ensuring certainty and predictability than the flexibility that a doctrine of *forum non conveniens* provides. There is no doubt that the uncertainty inherent in exercising a discretionary power leads to litigation, which involves delay and expense to the parties.[76]

(viii) A Negative Conflict of Jurisdiction

Declining jurisdiction can give rise to fears of a negative conflict of jurisdiction, i.e. that no court will try the case.[77] The Dutch reporters comment

[74] There is, though, the obvious exception of Quebec with its codified provision on *forum non conveniens*: see above, pp. 16–17.

[75] Art. 25(1). [76] See generally Robertson, (1987) 103 *LQR* 398.

[77] For German fears see below, p. 195.

that the decision on *forum non conveniens* may decide the case itself because of limitation periods.[78] Common law jurisdictions can get round this danger by refusing a stay of local proceedings in the situation where the plaintiff is time-barred abroad.[79] Alternatively, the staying of local proceedings may be made subject to undertakings by the defendant, which may include an undertaking to consent to the jurisdiction of the foreign court and to continue to waive defences based on statutes of limitations.[80]

(ix) Choice of Law

The Swiss reporter has suggested that another reason for the absence of a doctrine of *forum non conveniens* may be that in these States it is less likely than in common law jurisdictions that the local forum applies the *lex fori*. It follows that the rules on jurisdiction need not be corrected so much in order to avoid the application of the *lex fori*.

(b) *FORUM NON CONVENIENS* SUBSTITUTES

A *forum non conveniens* substitute is a limited power to decline jurisdiction, or deny that there is jurisdiction, in specific and limited circumstances, on the basis of *forum non conveniens*-type considerations. Nearly all of those States surveyed which have not adopted a general doctrine of *forum non conveniens* have adopted substitutes. The precise details of these substitutes vary from one State to another, and so will be examined on a State-by-State basis.

(i) The Provisions

(i) The Netherlands

There is a statutory *forum non conveniens* rule in proceedings instituted by way of a petition to the court, such as family cases, disputes concerning the management of companies, disputes over the fixing of rent for dwelling-houses, and reduction of liability in transport cases. This rule is set out in section 11 of Article 429c of the Code of Civil Procedure (WBRv) and states that: 'A court has no jurisdiction if the petition is insufficiently connected with the legal sphere of The Netherlands.' This corrects the broad rule which confers jurisdiction by the sole introduction of a petition. There are numerous such cases where *forum non conveniens* has been used. Interestingly, its role in petition cases is the same as that in common law jurisdictions, in that it prevents the forum-shopping which liberal rules on international jurisdiction allow. There is also a *forum non conveniens*-type

[78] See below, p. 323. [79] *Spiliada Maritime Corp* v. *Cansulex Ltd*, n. 13 above, at 483–4.
[80] See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984*, 809 F. 2d 195 (2nd Cir. 1987), *cert. denied sub nom Executive Comm. Members* v. *Union of India*, 484 US 871 (1987).

rule in summons cases which is of case law origin. According to the *Piscator* case[81] the parties are free to confer jurisdiction on a Dutch court by means of a choice of jurisdiction agreement 'unless a reasonable interest is lacking'. Finally, in recent cases involving interim injunction proceedings, district court presidents use *forum non conveniens* considerations more and more to deny jurisdiction.

(ii) Germany

A guardianship court can refrain from placing the ward under its protection if the ward's interests are better served by a foreign court's jurisdiction.[82] Moreover, the principle of *perpetuatio fori*[83] is relaxed in non-contentious proceedings in the interest of the child, especially in adoption cases when the adopting person or child changes his habitual residence to a foreign State. There is also a doctrine of incompatible competence under which, if the applicable foreign law requires from the German court an impossible or unacceptable activity, there is no German international jurisdiction. Finally, there is a doctrine of 'legitimate interest to take legal action', which may be invoked if the plaintiff abuses the judicial procedure.

(iii) Belgium

Belgian law uses a mechanism in uncontested matters which closely resembles the doctrine of *forum non conveniens*. This technique is concerned with the control of *fraude à la loi*. Thus in one case involving an application for divorce by mutual consent involving two foreigners, the Belgian judge verified that the parties had not intended to escape the law that was normally applicable by a foreign court.[84]

(iv) France

In France there is particular criticism of the concept of *forum non conveniens*. However, as in Germany, there is a doctrine of 'legitimate interest to take legal action' which is able to prevent abuse of procedure.

(v) Greece

It is possible to argue that a discretionary power exists by virtue of the prohibition under the Constitution on the 'abusive exercise of [any] rights'.[85] There are also requirements under the Civil Code[86] and the Code of Civil Procedure[87] that the parties act in good faith. The action is to be dismissed as 'abusive' when the litigation does not show any connection

[81] HR, 1 Feb. 1985, [1985] NJ 698 JCS, [1989] *NILR* 59.
[82] S. 47 FGG (Code on Non-contentious proceedings).
[83] S. 261 III, No. 2, ZPO.
[84] Brussels, 23 Mar. 1977, [1978] JT 647.
[85] Art. 25.
[86] Art. 281.
[87] Art. 116.

with the Greek court whose jurisdiction has been invoked and the plaintiff seeks to achieve 'improper' aims or other aims than those allowed by the jurisdictional rules.

(vi) Switzerland

The best example of a *forum non conveniens* substitute in Switzerland is to be found in relation to children. Swiss courts regularly refuse to act on behalf of a Swiss child because the authorities at the child's foreign place of residence are better informed, and therefore the foreign State is a more convenient forum.[88]

Swiss law also contains a number of provisions where a *forum conveniens* discretion operates, whereby jurisdiction is taken on the basis that the foreign forum is inappropriate, rather than on the more usual basis of the local forum being appropriate. Thus Swiss law provides for a subsidiary jurisdiction in cases where a Swiss citizen lives abroad and the action cannot be brought in the regular forum abroad, for example because the foreign courts are not impartial.[89] In some respects, this is close to a doctrine of *forum non conveniens*. After all, if the foreign forum is not inappropriate the Swiss court will not try the case and, under *forum non conveniens*, if the foreign forum is more appropriate the same result will follow: the local forum will not try the case. Indeed, the Swiss reporter refers to such subsidiary jurisdiction as a *forum non conveniens* substitute. None the less, the Swiss rule is essentially a positive one, concerned with the assertion of jurisdiction, rather than a negative rule, which denies jurisdiction or leads to a declining of jurisdiction. The emphasis is very different under the Swiss rule from that under a doctrine of *forum non conveniens*. The Swiss rule is biased against jurisdiction being taken; there will only be jurisdiction if it can be shown that the foreign forum is inappropriate. Under *forum non conveniens* the rule is biased in favour of trying the case, for trial continues unless it can be shown that the forum abroad is more appropriate.

(vii) Finland

A discretion is exercised to decide whether there should be a prosecution in Finland in criminal cases concerning an offence committed abroad. The exercise of this discretion involves taking into account typical *forum non conveniens* considerations: nationality, domicile, and residence of the

[88] See Art. 85 of the Swiss Private International Law Statute of 1987, which refers to the Hague Convention on Jurisdiction and the Law Applicable to the Protection of Minors of 1961. See Art. 4(1) of that Convention.

[89] See e.g. Arts. 43(2), 47, 60, 67, 76, 80, 87 of the Swiss Private International Law Statute of 1987.

defendant and victim, the availability of evidence, and the probability of a fair trial abroad.

(viii) Argentina

There are a number of procedural mechanisms (for example, involving a motion to dismiss or decline jurisdiction), which come into play in cases of doubt concerning the impartiality of local judges or with a view to ensuring that justice is really done.

(ii) A Comparison with *Forum Non Conveniens*

A comparison with the common law doctrine of *forum non conveniens* shows the following similarities. First, with *forum non conveniens* substitutes, a negative doctrine is being applied so that jurisdiction is declined or denied. Secondly, *forum non conveniens*-type considerations are being employed to justify this declining/denial of jurisdiction.

There are, though, the following important differences. First, with the *forum non conveniens* substitutes, the power to decline/deny jurisdiction operates only in very limited circumstances, such as certain family law matters. It does not involve a general discretionary power. Secondly, normally jurisdiction is denied (i.e. there is no jurisdiction), rather than declined (i.e. there is jurisdiction but this is not exercised). Thirdly, the basis on which jurisdiction is declined/denied is that the local forum is inappropriate. This contrasts with the position in most common law jurisdictions (but not Australia), where the basis is that the alternative forum abroad is more appropriate. As has been seen, this difference in emphasis is a significant one, since it is harder to show that a local forum is inappropriate than that a foreign forum is more appropriate.

IV
LIS PENDENS

1. The Nature of the Problem

It is widely accepted that it is undesirable to have a situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different States at the same time (*lis pendens*). There is an obvious risk that, if the proceedings continue, this may result in two irreconcilable judgments.[90] In order to avoid this, there may be an ugly rush by the parties to get one action decided ahead of the

[90] See Case 144/86 *Gubisch Maschinenfabrik KG* v. *Palumbo* [1987] ECR 4861 at 4874; Case C-351/89 *Overseas Union Insurance Ltd* v. *New Hampshire Insurance Co* [1992] 2 WLR 586.

other,[91] which will lead to problems of *res judicata*. *Lis pendens* is seen by many States as being essentially a problem relating to the recognition and enforcement of foreign judgments. It is certainly true that, the wider the rules on recognition and enforcement of foreign judgments, the more of a problem *lis pendens* becomes. Thus the semi-automatic recognition and enforcement of judgments within Western Europe under the Brussels and Lugano Conventions create a very real risk of being required to recognize a foreign judgment which conflicts with one granted in the recognizing State (or one granted in some other State whose judgments also have to be recognized). In contrast, if a State refuses to recognize and enforce foreign judgments—and this is the position in Sweden and Finland (unless there is a treaty obligation)—*lis pendens* is not seen as being a problem.

There is, though, an additional and less commonly voiced objection to allowing parallel proceedings to continue, in that it creates additional inconvenience and expense to the parties. It is not surprising to find English judges voicing this concern;[92] they also take such considerations into account under the doctrine of *forum non conveniens*. What is perhaps more surprising is to find this concern being voiced by reporters from Greece and Italy, which have no such doctrine.[93]

2. Ways of Dealing with the Problem

There are, in theory, four possible ways of dealing with the problem of *lis pendens*.

First, the forum could decline jurisdiction or suspend proceedings.

Secondly, the forum could seek to restrain the foreign proceedings.

Thirdly, both sets of proceedings could be allowed to continue. However, rules of *res judicata* could be used to prevent two judgments; if there are two judgments, rules on recognition and enforcement could be used to decide which one is to have priority.

Fourthly, mechanisms could be adopted to encourage the parties to opt for trial in just one forum (the appropriate forum).

In most States the first method is the one that has found favour. This statement of the overall position should, though, be qualified by the observation that, in a substantial number of States, there is neither explicit statutory/code provision nor established case law on *lis pendens*, so that it is not possible to state with confidence what the position is in these States. This is the situation in Japan, where there are conflicting authorities; in Greece (in non-convention cases), where, because of the lack of authority, the analogy is drawn with *lis pendens* under internal law; in Finland,

[91] *The Abidin Daver*, n. 32 above, at 412; *Du Pont (EI) de Nemours & Co* v. *Agnew and Kerr* [1987] 2 Lloyd's Rep. 585 (CA).

[92] See *The Abidin Daver*, n. 32 above.

[93] See below, pp. 249, 282.

where (in non-convention cases) there are no precedents and the basis of the doctrine is vague; and in Sweden, where, apart from convention cases, there is no statutory rule on this topic. Nonetheless, there are suggestions from the national reporters in these States as to how the problem of *lis pendens* could be dealt with.

The four different ways of dealing with the problem of *lis pendens* will now be examined.

(a) DECLINING JURISDICTION/SUSPENDING PROCEEDINGS

Although very many States have adopted rules on declining jurisdiction and/or suspending proceedings in cases of *lis pendens*, there is no uniformity as to the basis for this. It may be on the basis of *forum non conveniens* or a mechanical rule which gives priority to the State which is first seised of the proceedings or a recognition prognosis.

(i) *Forum Non Conveniens*

(i) Lis Pendens as a Factor when Operating the Discretion

In Britain, the Commonwealth States of Australia, Canada, and New Zealand, and Israel, *lis pendens* is not a doctrine in its own right but is regarded as being overall a facet, albeit an important one, of the doctrine of *forum non conveniens*. In exercising the discretion to stay the action in the forum considerable weight may be given to the *lis pendens* factor because of the well recognized undesirability of allowing the two sets of proceedings to continue.

In Canada (common law jurisdictions), *lis pendens* has been given most weight when the same party is the plaintiff in both the local and the foreign proceedings. Although, even in this situation, it may be possible to justify the continuance of the proceedings in the forum. In reversed party cases the *lis pendens* argument is harder to make because it is not one person who has commenced parallel proceedings. It is irrelevant under English law which action is started first, the one in the forum or the one abroad, and under New Zealand law this is said not to be decisive. However, under both English and New Zealand law, what is very relevant is the question how far each set of proceedings has progressed. If no substantial progress has been made in the foreign proceedings, for example there has been no discovery of documents, the *lis pendens* consideration will be given little weight.[94] In the New Zealand case of *McConnell Dowell Constructors Ltd* v. *Lloyd's Syndicate 396*[95] Cooke P said that with

[94] *Arkwright Mutual Insurance Co* v. *Bryanston Insurance Co Ltd* [1990] 2 Lloyd's Rep. 70 at 80. See also *De Dampierre* v. *De Dampierre* [1988] AC 92 at 108. Compare *The 'Varna' (No. 2)* [1994] 2 Lloyd's Rep. 41.

[95] [1988] 2 NZLR 257.

actions started more or less contemporaneously (ten days apart in the instant case) the court should move straight to the *forum non conveniens* rule set out in the *Spiliada* case, ignoring the *lis pendens* factor.

In Australia, as an alternative to granting a permanent stay or dismissal of an action, the courts have sometimes granted a temporary stay or lengthy adjournment of a case. In this situation, the Australian rules on *forum non conveniens* have no application.

Under Japanese law, although there is no explicit statutory provision nor well established case law in relation to *lis pendens*, in one case[96] it was taken into consideration under the 'special circumstances' doctrine.[97] The court noted that assuming jurisdiction would run a risk of delivering a judgment conflicting with those of the Californian courts, and that the parallel proceedings would lead to a heavy burden upon the defendant. The result in the case was that the Japanese court denied that it had jurisdiction.

In Quebec *forum non conveniens* has been used to avoid the possibility of contradictory judgments. However, Article 3137 of the recent Civil Code deals with *lis pendens* by the recognition prognosis method.[98]

In the United States there is a rather different approach towards *lis pendens*. Although the *forum non conveniens* doctrine may operate in cases of *lis pendens*, there appears to be no evidence that the *lis pendens* factor is given the weight in favour of declining jurisdiction that it has been given in other common law jurisdictions. Instead, in the United States in *lis pendens* cases the question that normally arises is whether the foreign proceedings should be restrained, i.e. the second way of dealing with the problem of *lis pendens* is employed.[99]

(ii) A Critique

The great virtue of the *forum non conveniens* approach is its flexibility. It can deal with any case involving parallel proceedings, even one where the parties or the cause of action are not the same. This is not a situation of *lis pendens*, as defined above,[100] none the less it is still undesirable that the parallel proceedings should continue in both States, for the risk of additional expense and inconvenience to the parties, and of irreconcilable judgments, is there in such circumstances. Thus, in English law, the concern has been to avoid a multiplicity of proceedings in England and abroad rather than about *lis pendens*, as strictly defined.[101]

[96] *Greenlines Shipping Co Ltd* v. *California First Bank*, 28 Japanese Annual of International Law 243 (1985).

[97] As has already been seen, above, pp. 17–18, the special circumstances doctrine is technically not a doctrine of *forum non conveniens*.

[98] See below, p. 37. [99] See below, pp. 40–1. [100] Above, p. 27.

[101] See e.g. *Hawke Bay Shipping Co Ltd* v. *The First National Bank of Chicago (The Efthimis)* [1986] 1 Lloyd's Rep. 244 (CA).

The great vice of the *forum non conveniens* approach is that, once proceedings have been commenced in State A, a party may go to State B (a more appropriate forum) and commence proceedings for a negative declaration that State A is not an appropriate forum for trial. This disadvantage stems from the fact that it is not in itself relevant under the *forum non conveniens* doctrine which court was first seised of the proceedings.

For a State such as Japan which, under its domestic procedural law treats jurisdiction and *lis pendens* as being separate, the *forum non conveniens* approach has an obvious lack of attraction. Thus, although there is the one authority adopting the *forum non conveniens* approach, other cases have adopted different solutions.[102]

(ii) The Mechanical First-Seised Approach

This approach requires the courts of the forum to defer to the courts of a foreign State if the latter are first seised of the proceedings.

(i) The Provisions

A well known example of a rule adopting this approach is Article 21 of the Brussels and Lugano Conventions which provides that:

> Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Essentially the same rule has been suggested in a number of Western European States in non-Convention cases. Sweden has entered into a number of other recognition and enforcement treaties besides the Lugano Convention. Even though these do not contain an Article 21-type provision, it is suggested by the Swedish reporter that the *lis pendens* doctrine will be applied to foreign proceedings in these cases too.

Greek law contains no provisions which explicitly deal with *lis pendens*. Nonetheless, most Greek scholars are of the opinion that foreign litispendence must be recognized under certain circumstances. The view is taken that foreign and domestic proceedings are equivalent; resort can therefore be had, by way of analogy, to Article 222 of the Code of Civil Procedure, which is the domestic *lis pendens* rule. This states that 'after the commencement of the litispendence and during the time it lasts no new proceedings are permitted before any other court . . .'. The conditions necessary for domestic *lis pendens* must be fulfilled; there must be the same dispute between the same parties having the same status. Dutch law

[102] See below, pp. 310–16.

in non-Convention cases is unusual in that it combines an element of discretion with the first-seised principle. Thus the courts are not obliged to stay proceedings if another court has been first seised. Nonetheless, as a rule in the case of actions between the same parties on the same subject-matter Dutch courts always defer to the court first seised.

Moving outside Western Europe, Argentinian law has a doctrine of *litispendencia*. *Litispendencia* by identity requires that the parties, object, and cause be the same for both sets of proceedings. In this situation the Argentinian judge will decline jurisdiction in respect of the second proceedings.

Even common law jurisdictions sometimes resort to mechanical rules to deal with *lis pendens* in certain narrowly defined circumstances. Under the Canadian federal Divorce Act jurisdiction is given to a province if one spouse has been ordinarily resident there for one year. Resulting problems of *lis pendens* are solved by a rule that gives exclusive jurisdiction to the court of the province or territory in which a petition is first presented.[103] New Zealand also has a specific statutory provision, which is narrow in its scope, being limited to the area of admiralty jurisdiction. Section 6 of the Admiralty Act 1973 provides that the New Zealand courts cannot exercise admiralty jurisdiction *in personam* while proceedings between the same parties are pending in any foreign court, unless the defendant submits or has agreed to submit to their jurisdiction.

(ii) When is a Court Seised of Proceedings?

It is left to the internal law of each State to determine, by reference to its own procedural rules, when its courts are seised of proceedings; normally, the choice is between the moment when the document instituting the proceedings is filed with a local court and the later moment when this document is served on the defendant. Unfortunately, in a number of States the procedural rules do not give a clear answer. Moreover, in those States where a clear answer is given, it is readily apparent that there is no uniformity as to the moment when proceedings become pending.

Uncertainty—In Scotland there is uncertainty simply because there is no authority on when Scots courts are seised of proceedings.[104] The position is also not clear in Greece where one view, favoured by the Greek reporter,[105] is that an action is pending when there is service with a copy of the complaint: the other view is that this occurs when the action is earlier filed before the court.

The position in Switzerland, at first sight, looks to be clear. A Swiss court is seised of proceedings 'when the first act necessary to commence a

[103] Divorce Act, RSC 1985, c.3 (2nd Supp.), s. 3(2).

[104] The Schlosser Report ([1979] OJ C59/125) took the view that in Scotland 'proceedings become pending only when service of the summons has been effected on the defender'.

[105] See below, p. 253.

lawsuit is performed'.[106] To commence the lawsuit it is sufficient to initiate conciliation proceedings. However, the Court of Appeal of the Zürich Canton,[107] applying the principle adopted by the European Court of Justice[108] that a court is first seised when the requirements for proceedings to become *definitively* pending are first fulfilled, held that an application for conciliation does not commence proceedings *definitively*. After conciliation proceedings, a Justice of the Peace has to issue a document which entitles the plaintiff to commence court proceedings. This document may be filed with a court. If this is not done within a certain time (in Zürich, within three months), the effect of the document and the proceedings expires. If the plaintiff wants to start new proceedings after the lapse of this time, he has to start proceedings again with the Justice of the Peace.

The English courts have in recent years changed their minds over the precise moment when they are seised of jurisdiction. Initially, this was said to be when proceedings were merely issued. Subsequently, it was decided that, in general, it was to be when the proceedings were served on the defendant.[109] It was suggested, though, that there was an exception to this general rule, whereby if prior to service a provisional measure, such as a Mareva injunction, were granted by the court, it would be seised from the moment that this pre-service jurisdiction was exercised.[110] However, it has recently been decided by the Court of Appeal[111] that there are no exceptions to the simple and practical rule that an English court is seised on the date of service of the writ. When it comes to the grant of provisional measures, a court is not seised of jurisdiction on the merits of the dispute. Neither is a court seised merely by virtue of granting an order for service of process out of the jurisdiction. Leave to appeal to the House of Lords against this decision has, however, been granted.

National courts have enough difficulty in deciding when, under their own procedural rules, their courts are seised of jurisdiction. They will have even more difficulty in working out when a foreign court, under its procedural rules, is so seised, and there is always the risk of getting this wrong.[112] One way of solving this difficulty is to adjourn local proceedings until the foreign court has determined when its own proceedings have become pending.[113]

[106] Art. 9(2) of the Swiss Private International Law Statute of 1987.

[107] Obergericht, Zürich, 25 July 1991, 90 *Blätter für Zürcherische Rechtsprechung* 193 (1991).

[108] Case 129/83 *Zelger* v. *Salinitri* [1984] ECR 2398 at 2409.

[109] *Dresser UK Ltd* v. *Falcongate Freight Management Ltd* [1992] 2 QB 502.

[110] *Ibid.* 523 (*per* Bingham LJ).

[111] *Neste Chemicals SA* v. *DK Line SA (The Sargasso)* [1994] 3 All ER 180.

[112] Compare the German view (below, pp. 198–9) that German courts are seised of jurisdiction at the moment of service, with an Italian decision which states that German courts are seised when the action was filed (*Delta GmbH* v. *Mondial Express s.p.a. and Atex srl* (Corte di Cassazione, 12 October 1990, n. 10014) [1992] 4 *Riv. Dir. Int. Priv. Proc.* 956).

[113] *Polly Peck International Ltd* v. *Citibank NA* [1994] ILPr. 71.

Lack of Uniformity—Many States agree that their courts are seised of jurisdiction when the proceedings are served on the defendant (e.g. Italy,[114] Germany, The Netherlands, and England), and so the race by the parties to commence proceedings starts from the same point.[115] However, there is not complete uniformity on this. In Sweden the procedural rule is different; a court is considered seised when the summons application is filed with the court or, if a summons is not necessary, when the claim is presented to the court.[116] This early rule encourages plaintiffs to forum-shop in Sweden. To take an example, a person who knows that an action has been started against him in England, but has not yet been served, can go to Sweden, file an application, and thereby give priority to the Swedish action under the first-seised rule.[117]

As the German reporter points out,[118] the way to produce certainty and uniformity in relation to the first-seised rule, at least within the European Community, is for the European Court of Justice to give an autonomous meaning to the concept of when a court is seised of jurisdiction, rather than leaving it to national procedural law.

(iii) A Critique

The virtue of the first-seised approach is its simplicity. Against this, this approach has the following numerous vices.

First, any mechanical *lis pendens* rule, particularly when enshrined in a code, a convention, or a statute, is going to have to define the meaning of *lis pendens*. Thus Article 21 of the Brussels and Lugano Conventions contains a definition of *lis pendens* in terms of 'the same parties' and 'the same cause of action'. This has led to a considerable body of case law interpreting these terms. The European Court of Justice has clarified the meaning of 'the same cause of action'.[119] This refers to the proceedings being based on the same contractual relationship. This liberal interpretation contrasts with the restrictive view previously taken under Italian law.[120] It has also made clear that there is a separate, albeit closely related, requirement that the subject-matter of the proceedings must be the same. A decision of the European Court of Justice is eagerly awaited on the interpretation of the requirement that the parties must be the same.[121] In England there have

[114] See Art. 39(3), Code of Civil Procedure; *Delta GmbH* v. *Mondial Express s.p.a. and Atex srl*, n. 112 above.

[115] See e.g. *AGF* v. *Chiyoda* [1992] 1 Lloyd's Rep. 325—actions pending in England and Italy; *Neste Chemicals SA* v. *DK Line SA (The Sargasso)*, n. 111 above—actions pending in England and The Netherlands.

[116] Ch. 13, s. 4 of the Swedish Code of Judicial Procedure.

[117] See below, p. 376. [118] See below, p. 199.

[119] Case 144/86 *Gubisch Maschinenfabrik KG* v. *Giulio Palumbo* [1987] ECR 4861. For French criticism see below, pp. 182–3. [120] See below, p. 292.

[121] This has been referred to the ECJ in Case C–406/92 *The Maciej Rataj*. Tesauro AG gave his opinion on 13 July 1994 that *lis pendens* arises whenever there is total or partial identity

been considerable difficulties over whether this requirement is satisfied in the situation where the two actions are an admiralty action *in rem* and an action *in personam*.[122] There have also been difficulties in the situation in which there is complex litigation involving many parties, some, but not all, of whom may be parties to both actions.[123]

Secondly, if you have a definition in terms of the same parties and cause of action there is an obvious temptation for a party to evade the *lis pendens* provision by adding another party or another cause of action.

Thirdly, it is necessary to make separate provision for certain cases falling outside the definition of *lis pendens*. Thus Article 22 of the Brussels and Lugano Conventions deals with 'related actions'.

Fourthly, which court is first seised may be an accident of timing. Moreover, actions may be started contemporaneously.

Fifthly, the first-seised rule, far from acting as a disincentive to parallel proceedings, acts as a positive incentive to this. It leads to an unseemly race by the parties to be the first to commence proceedings.

Sixthly, a party may start proceedings first in order to block proceedings in another State, and then engage in delaying tactics. This consideration has led to exceptions to the priority principle being created in Italy and Germany, in cases under the Italo–German bilateral Convention.[124]

Seventhly, the lack of uniformity over the question when a court is seised of proceedings means that the race to institute proceedings may commence from different starting points. Moreover, it may not be clear when the race starts because of the uncertainty in some States over when a court is seised of proceedings.

Eighthly, what happens if the court second seised has exclusive jurisdiction; does it still have to give way to the court first seised? The European Court of Justice has left this question open.[125] However, the English Court of Appeal has held that, if the court second seised has jurisdiction conferred on it by the agreement of the parties under Article 17 of the Brussels Convention, this takes precedence over Article 21.[126]

of subject-matter, cause of action, and parties as between two or more actions. In particular, the fact that the forms of the actions differ under the procedural laws of the two States concerned is unimportant. However, the obligation of the court second seised to decline jurisdiction under Art. 21 applies only to that part of the proceedings which has the same subject-matter and parties as the proceedings commenced previously.

[122] See *The Nordglimt* [1988] QB 183; *The Kherson* [1992] 2 Lloyd's Rep. 261.

[123] *The Maciej Rataj* [1992] 2 Lloyd's Rep. 552 (CA); referred to the ECJ. See also *Kinnear* v. *Falconfilms NV* [1994] 3 All ER 42 at 50–51.

[124] See below, p. 39; for the Italian case law see below, p. 290.

[125] Case C–351/89 *Overseas Union Insurance Ltd* v. *New Hampshire Insurance Co* [1992] 1 QB 434.

[126] *Continental Bank NA* v. *Aeakos Compania Naviera SA* [1994] 1 WLR 588.

(iii) Recognition Prognosis

Under this approach a court will decline jurisdiction if the action abroad is likely to lead to a judgment which is recognizable in its State. A recognition prognosis involves the application of a mechanical rule rather than a discretionary rule as understood by common lawyers, who are used to the *forum non conveniens* discretion. At the same time, one should not underestimate the important role and the power that is given to judges when calculating whether a foreign judgment is recognizable.

(i) The Provisions

This method of dealing with *lis pendens* has been commonly adopted in Western European States in non-Convention cases. Thus Article 9 of the Swiss Private International Law Statute of 1987 states that 'If a lawsuit on the same matter between the same parties is already pending abroad, the Swiss courts must stay the proceedings if it is to be expected that the foreign court will, within a reasonable time, render a judgment recognizable in Switzerland.'[127] If there is a foreign judgment abroad the Swiss courts must dismiss the proceedings if that judgment is recognizable in Switzerland. The French and German positions are the same as that in Switzerland. The foreign tribunal must have been *earlier* seised of the proceedings. This rule combines both the mechanical first-seised approach and the recognition prognosis approach.

Italian law operates a similar, albeit not identical, rule under certain bilateral conventions on recognition and enforcement of judgments entered into with France, Germany, Switzerland, and Austria, and which are largely replaced by the multilateral Brussels/Lugano Conventions. These bilateral conventions require dismissal of a local action where: (i) the foreign court was first seised of the proceedings, and (ii) there is identity of or connexity between the concurrent actions, and (iii) the foreign court had jurisdiction under the convention or (in the case of the Italo–Austrian Convention) it is expected that the foreign judgment will be recognized in the forum.

A provision involving dismissal or a stay of the proceedings in the forum, on the basis of a recognition prognosis, is to be found in Article 20 of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971,[128] which has been

[127] See also Art. 9(1) of the Swiss–Liechtenstein Treaty of 1968 on the recognition and enforcement of judicial decisions and arbitral awards in civil matters; the decision of the Cour de Cassation in *Miniera di Fragne*, Civ. lère, 26 Nov. 1974, [1975] RC 491, note D. Holleaux; [1975] JDI 108, note Ponsard; Grands arrêts . . . 2ème éd., n°. 55.

[128] Art. 20 only applies if two States have concluded a Supplementary Agreement pursuant to Art. 21.

ratified by Cyprus, The Netherlands, and Portugal. However, this does not appear to require that the foreign tribunal was first seised of the proceedings.

The Greek co-reporter suggests that a recognition prognosis should be adopted in cases where the Greek courts are second-seised.

In the Scandinavian States of Finland and Sweden there is no authority dealing with *lis pendens*, so the position is necessarily rather speculative. Nonetheless, it is suggested in Finland that 'the Finnish court seised second should as a rule decline jurisdiction in favour of the court seised first, if the judgment of the first court ought to be recognized and/or enforced in Finland'.[129] This adopts the Swiss, French, and German approach. The suggested rule in Sweden goes even further, in that it is concerned with foreign judgments that have merely evidentiary value in Sweden. It is suggested that the Swedish courts are free to stay proceedings in order to wait for such a judgment, unless the postponement would lead to excessive delay.[130] This limited suggestion arises because under Swedish law, while foreign judgments are not recognized and enforced (outside treaty obligations), they are given certain evidentiary value. It is envisaged that the decision whether to stay would be a matter of discretion for the Swedish court.

Moving outside Western Europe, Quebec has a provision which looks to be similar, although not identical, to the Swiss law. Article 3137 of the Civil Code states that:

> On the application of a party, a Quebec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognised in Quebec, or if such a decision has already been rendered by a foreign authority.

There is, though, one vital difference between this recognition prognosis rule and those so far considered. The fact that a Quebecois authority *may* stay its ruling means that it is arguable that, even if all the conditions of Article 3137 have been met, a Quebecois authority could still refuse to stay its ruling. It is possible that some of the considerations that come into play when applying the Quebecois *forum non conveniens* discretion would operate in this context as well. However, the discretion under Article 3137 is said to operate merely as an antidote to the vagueness of the requirements, particularly for an identity of the objects of each action, under this Article. Moreover, under Article 3137 the Quebecois court stays (i.e. suspends) its ruling, whereas with *forum non conveniens* it declines jurisdiction.

[129] See below, p. 171. [130] See below, p. 375.

There is one Japanese case which has adopted a recognition prognosis.[131] This required a 'reasonable certainty that the first action in the foreign country will result in an irrevocable judgment which can be recognized in Japan'.[132] What is particularly interesting about this case is the attention that was paid by the court to the question how far the proceedings abroad had progressed, a matter which, as has already been seen,[133] is of considerable importance in common law jurisdictions when using the doctrine of *forum non conveniens* to deal with *lis pendens*. In the instant case it was uncertain whether an Ohio case would come to judgment because of a dispute over jurisdiction. It was also too early to predict the possibility of recognition in Japan when the foreign proceedings were still at their starting point.

(ii) A Critique

There is an obvious logic in the recognition prognosis rule in that a foreign action can be regarded as being a premature foreign judgment. At the same time, the problem of irreconcilable judgments will only arise if the foreign judgment is one that is recognized.

Against this, this approach has the following vices:

First, if the foreign judgment is not recognizable, the parallel proceedings will be allowed to continue. But this will create additional expense and inconvenience to the parties. The recognition prognosis method is only suitable for dealing with *lis pendens* if the evils of parallel proceedings are seen solely in terms of the risk of irreconcilable judgments. Moreover, in States like Sweden and Finland, which, in the absence of a treaty obligation, fail to recognize foreign judgments, the court is left with no means of stopping parallel proceedings.

Secondly, the recognition prognosis rule suffers from the same flaw as the mechanical first-seised rule, in that *lis pendens* has to be defined. Article 3137 of the Civil Code of Quebec does this by reference to the actions being 'between the same parties, based on the same facts and having the same object'. These concepts have given rise to definitional problems and to a considerable body of case law.[134] It is interesting to note that, unlike the Brussels and Lugano Conventions, the reference in Quebec is not to the same cause of action, but to the broader and vaguer requirement of the same facts.

Thirdly, there is the same problem of the risk of evasion of the *lis pendens* provision as is encountered with the mechanical first-seised rule.

Fourthly, it is necessary to make separate provision for cases falling

[131] The Tokyo District Court judgment of 30 May 1989. [132] See below, p. 313.
[133] Above, pp. 29–30. [134] See below, pp. 158–161.

outside the definition of *lis pendens*. Thus the Civil Code of Quebec has, after its provision on *lis pendens*, a provision on linked actions.[135]

Fifthly, in so far as a recognition prognosis, in some States, also refers to the court first seised of the proceedings, the same objections can be made here as were made as the fourth, fifth, sixth, seventh, and eighth objections to the mechanical first-seised rule.

Sixthly, as the Italian reporter points out,[136] it is not easy to predict whether a foreign judgment will be recognized in the forum. There is a particular difficulty with certain defences, such as public policy, which can only properly be considered after the foreign judgment has been granted.

Seventhly, what happens if subsequently it turns out that the foreign judgment cannot be recognized? German law has sought to deal with this problem by adopting a procedure of initially suspending, rather than dismissing, local proceedings. Dismissal will only take place once it is apparent that the plaintiff no longer has a need for domestic legal protection. Swiss courts also adopt a procedure of only suspending proceedings and do not decline jurisdiction. In contrast to this, Japanese law has no power to suspend local proceedings; it can only dismiss them. It therefore requires under its recognition prognosis rule *reasonable certainty* that the first action will be recognized. Nonetheless, it is still possible to envisage a situation arising in Japan whereby the local action is dismissed but the foreign judgment is subsequently not enforced. In the meantime, the claim may have expired in Japan because of the Japanese rules on prescription.[137]

Eighthly, what happens if there is an inordinate delay in the foreign court producing its judgment? Swiss law has attempted to solve this problem by providing that the recognition prognosis only operates if it is expected that the foreign court will, *within a reasonable time*, deliver a judgment. German law meets the problem by providing that the pendency ceases to be recognized when effective legal protection at the foreign forum is no longer guaranteed because of unduly long proceedings. Italian law does not go quite as far as this. However, for the defence of *lis pendens* to apply under the Italo–German Convention, the fact that an action has been instituted abroad is not sufficient. Attention has to be given to the handling and development of the case abroad.

(iv) Problems in Relation to Declining Jurisdiction/Suspending Proceedings

The first problem is how to deal with the situation where there is a challenge to the jurisdiction of the foreign court. What is essential is that

[135] Art. 3139, Civil Code of Quebec, discussed below, p. 46.
[136] See below, p. 286. [137] See below, pp. 315–6.

the local proceedings are not dismissed. Under Article 21 of the Brussels and Lugano Conventions there is a two-stage process whereby any court other than the court first seised stays (i.e. suspends) its proceedings until such time as the jurisdiction of the court first seised is established. Once it has been established, jurisdiction is declined.

Secondly, how long does litispendence continue for? Under Greek law many scholars take the view that litispendence is terminated at the moment that the decision of the first court becomes final. However, according to Greek jurisprudence litispendence is terminated at the moment the first-instance judgment is issued, and revives by the lodging of an appeal.

Thirdly, there can be a problem with provisional measures. Under Japanese law the result of the application of the recognition prognosis rule is the dismissal of the Japanese action. However, in order to obtain provisional measures there has to be an action brought on the merits. Since the local action is barred, the only possible solution is to regard the foreign action as one being brought on the merits. But the judge concerned with the provisional measures may not agree with the judge dealing with the local action on the merits over the recognition prognosis in relation to this foreign action.

(b) RESTRAINING THE FOREIGN PROCEEDINGS

The United States reporters refer to this as a method of dealing with the problem of parallel proceedings,[138] and there are cases in the United States where the inconvenience of parallel proceedings and the ensuing risk of irreconcilable judgments have been used in favour of restraining the foreign proceedings.[139] This is a technique that obviously is only available in those States in which judges have the power to restrain foreign proceedings. As will be seen, this power is confined to common law jurisdictions. This raises the question of the extent to which other common law jurisdictions are prepared to deal with the problem of parallel proceedings by restraining the foreign proceedings.

In England there are cases on restraining foreign proceedings which have taken into account the fact that failure to restrain will result in inconsistent judgments in England and abroad.[140] However, it is also true that, when faced with the situation where England was the natural forum for trial but Illinois also considered itself an appropriate forum for trial, the English Court of Appeal refused to restrain the foreign proceedings, since it was not prepared to resolve a dispute between England and

[138] See below, p. 418.

[139] See *Cargill, Inc* v. *Hartford Accident & Indemnity Co*, 531 F. Supp. 710 (D. Minn. 1982).

[140] See e.g. *Tracomin SA* v. *Sudan Oil Seed Co Ltd (Nos 1 and 2)* [1983] 1 WLR 1026 at 1035; *Sohio Co* v. *Gatoil (USA) Inc.* [1989] 1 Lloyd's Rep. 588.

Illinois as to which was the appropriate forum.[141] Of course, under English law the parallel proceedings factor operates strongly in favour of the English courts staying their own proceedings, in a way that does not appear to be the case in the United States, and accordingly there is much less occasion for considering a restraint of foreign proceedings.

(c) ALLOWING BOTH SETS OF PROCEEDINGS TO CONTINUE

In the United States, rather than dismissing local proceedings or restraining the foreign proceedings, the court may allow the parallel proceedings to continue. In one of the leading cases on restraining foreign proceedings, *Laker Airways* v. *Sabena, Belgian World Airlines*,[142] there is a well known quotation that 'the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other'.[143] The United States reporters indicate that, if the parties or cause of action are not the same, then the parallel proceedings will be allowed to continue.

Moving outside the United States, there are a number of Japanese cases where the presence of parallel proceedings was simply ignored.[144] The traditional approach under Italian law has also been to allow parallel proceedings to continue. Indeed, Italian law is unusual in non-Convention cases in positively rejecting a doctrine of *lis pendens*. Article 3 of the Code of Civil Procedure provides that 'Italian jurisdiction is not excluded by the pendency of the same case or another connected with it, before a foreign court'. Belgian law also rejects the use of a *lis pendens* exception in international cases, although the desirability of having such an exception is acknowledged by the Belgian reporter.[145] A *lis pendens* rule is only accepted in Belgium where it is contained in an international convention.

If both sets of proceedings are allowed to continue, the risk of irreconcilable judgments can be dealt with by the use of the doctrine of *res judicata*, provided that the conditions for the operation of this doctrine are met. However, this does nothing to stop the expense and inconvenience to the parties of parallel proceedings in the period leading up to the grant of the judgment necessary for *res judicata*.

If there are eventually two irreconcilable judgments, many States have special recognition and enforcement rules to deal with this. Thus the

[141] *Du Pont (EI) de Nemours & Co* v. *Agnew (No. 2)* [1988] 2 Lloyd's Rep. 240.
[142] 731 F.2d 909 (DC Cir. 1984). [143] *Ibid.*
[144] See e.g. the Tokyo High Court judgment on 18 July 1957, *Kakyusaibansho Minji—Hanreishu*, vol. 8, No. 7, 1282; below, p. 311.
[145] Below, pp. 109–10.

Brussels and Lugano Conventions have provisions dealing with the situation where the judgment (given in a Contracting State) is irreconcilable with a judgment given in the State in which recognition is sought,[146] and that where the judgment (given in a Contracting State) is irreconcilable with an earlier one given in a non-Contracting State.[147] Similarly, the English rules on enforcement of foreign judgments at common law provide a defence where the foreign judgment is on a matter previously determined by an English court.[148] Greek law contains a similar provision in Article 3(1) of the bilateral Treaty between Greece and Germany of 1961, something that is necessary, given the lack of an express provision on *lis pendens* under Greek law. English law has also had to come to grips with the situation where there are two competing foreign judgments. The Privy Council has recently laid down a general rule that the earlier of them is to be recognized and given effect to to the exclusion of the later.[149]

Under Dutch law, the fact that a Dutch court has already decided the matter means that recognition would be against public order. Finally, the Argentinian National Procedural Code lays down a rule whereby a foreign judgment shall not be recognized if it conflicts not only with a previous decision of an Argentinian court on the same matter but also with a simultaneous one.

Italian law operates a very different rule in relation to recognition and enforcement of foreign judgments from those so far mentioned. The Code of Civil Procedure states that[150] 'If an action is instituted in Italy before the foreign judgment becomes final, no proceedings may be brought to validate the foreign judgment.' This means that the mere institution of proceedings in Italy, rather than an Italian judgment, prevents the recognition of the foreign judgment in Italy. This is all part of the traditional nationalistic approach towards jurisdiction that has been adopted in Italy.

(d) ENCOURAGING THE PARTIES TO OPT FOR TRIAL IN JUST ONE FORUM

The Conflict of Jurisdiction Model Act,[151] prepared in 1989 by a subcommittee of the American Bar Association and adopted by the State of Connecticut, seeks to solve the problems of parallel proceedings by encouraging the parties early on to opt for trial in the appropriate forum, and discontinue proceedings in other fora. The Model Act sets out criteria for the identification of the appropriate forum, and a discretion is given to

[146] Art. 27(3). [147] Art. 27(5). [148] *Vervaeke* v. *Smith* [1983] 1 AC 145.
[149] *Showlag* v. *Mansour* [1994] 2 All ER 129. [150] Art. 797, para. 1, n°. 6.
[151] See Teitz, (1992) 26 *International Lawyer* 21. The Model Act is set out in App. 1.

refuse to enforce judgments granted in any State other than the appropriate forum.

When it comes to child custody cases in the United States all States have enacted the Uniform Child Custody Jurisdiction Act. This is concerned to determine a single 'court of custody'. Where such court is in a particular State, a court seised of the matter in another State must dismiss the action. This Act is also applied by the courts to foreign custody decrees. The Hague Convention on the civil aspects of international child abduction of 1980 forces custody issues to be litigated in the habitual residence of the child prior to the wrongful removal/retention of the child.

3. Related Actions

We are concerned here with the situation in which there are two actions, which are closely connected, proceeding in two different States at the same time. This situation may fall outside the definition of *lis pendens* because the parties or the cause of action are not the same in each action. Nonetheless, such related actions may give rise to irreconcilable judgments and to additional expense and inconvenience to the parties. In order to avoid this, the forum can either decline jurisdiction/suspend its proceedings or take jurisdiction over both actions. These two approaches towards the problem of related actions will now be examined.

(a) declining jurisdiction/suspending proceedings

(i) The Use of *Forum Non Conveniens*

In States which use the doctrine of *forum non conveniens* to deal with the problem of *lis pendens*, there is no need for a separate doctrine to deal with cases which fall outside the definition of *lis pendens*, as strictly understood. As has been seen, one of the great virtues of the *forum non conveniens* approach is that it is flexible enough to deal with the situation where there are parallel proceedings but the parties or cause of action are not the same. Under English law there are examples of the doctrine of *forum non conveniens* being used to stay (in effect, dismiss) the local proceedings when there are such related actions. In the United States, while, in theory, it is possible to use the doctrine of *forum non conveniens* where there are related actions, it seems that, in practice, the courts allow both actions to proceed if not satisfied that the issues in both proceedings are the same or that the parties, either at present or potentially, are not the same.

(ii) A Separate Rule

The real difficulty arises for those States which use the mechanical first-seised approach or the recognition prognosis approach to deal with *lis*

pendens, and, having adopted a strict definition of *lis pendens*, are then faced with parallel proceedings which fall outside this definition. The obvious solution for such States is to have a separate rule dealing with related actions. There is a related action provision in the Brussels and Lugano Conventions, which immediately follows the *lis pendens* provision contained in Article 21. Paragraph 1 of Article 22 states that: 'Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings'. Related actions are defined under paragraph 3 as ones which 'are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[152] Article 22 is similar to the *lis pendens* provision in Article 21, in that it gives priority to the courts of the State which is first seised of the action. However, it is different in that the power to stay local proceedings is a discretionary one. The local court *may* rather than *must* stay its proceedings; it could decide to allow the local action to continue. This raises the question of what the criterion is for the exercise of this discretion. English courts have accepted that it is not a *forum non conveniens* discretion.[153] Normally, the local proceedings should be stayed.[154] The court second seised can take into account the nature of the proceedings in the court first seised.[155] The court must look at the various arguments, both on the merits and in relation to jurisdiction.[156] If the English courts have exclusive jurisdiction under Article 17 of the Brussels Convention (an agreement conferring jurisdiction), this is an important factor against staying the English action.[157] There is an obvious risk with any discretion that courts in different EC States will apply different criteria for the exercise of the discretion. The recent opinion of Advocate General Lenz of the European Court of Justice as to the factors relevant to the exercise of the Article 22 discretion is therefore very welcome. He mentioned three factors in particular (although there may be other important considerations): 'the extent of the relatedness and the risk of mutually irreconcilable decisions; the stage reached in each set of proceedings; and the proximity of the courts to the subject matter of the case'.[158] The effect of the stay under Article 22(1) is to suspend proceedings in the court second seised pending the judgment (or declining of jurisdiction) in the court first seised. That judgment

[152] The question whether this provides an exclusive definition has been referred to the ECJ by the English CA in *The Maciej Rataj*, n. 121.

[153] See *The Linda* [1988] 1 Lloyd's Rep. 175 at 179; *Virgin Aviation* v. *CAD Aviation The Times*, 2 Feb. 1990.

[154] *The Linda*, n. 153 above. [155] *The Maciej Rataj*, n. 121 above (Sheen J).

[156] *IP Metal Ltd* v. *Ruote OZ SpA* [1993] 2 Lloyd's Rep. 60.

[157] *Ibid.* English law was also applied.

[158] Case C–129/92 *Owens Bank Ltd* v. *Bracco and others (No 2)* [1994] 1 All ER 336 at 370.

subsequently may have to be recognized under the Brussels or Lugano Convention.

Dutch law (in non-Convention cases) applies a rule similar to Article 22. Generally, the Dutch courts refer related actions to the court first seised. They use their discretion to refuse to do so only if 'they consider the relationship between the actions too weak or if the proceedings in that other court are already in a too advanced stage'.[159]

There is little authority in France on this topic. There is said to be a psychological resistance to giving way to a foreign tribunal, and there is no significant example of this happening. Nonetheless, the Cour de Cassation has not shown itself hostile to the reception of the doctrine of related actions (*connexité*).

The Italo–French Convention extends its *lis pendens* rule to related actions. There are also proposals in Italy for a more general provision dealing with related claims.[160]

(iii) No Separate Rule

The common law jurisdictions, with their flexible doctrine of *forum non conveniens*, have no need for a separate related-actions rule, and there is nothing more to be said about these States. But there are other States in which there is a need for such a rule, but this is lacking. One such State is Japan and the Japanese reporter acknowledges the difficulty in using its recognition prognosis in cases where the cause of action is not the same in the parallel proceedings.[161] Finland also has no separate rules on related actions.

Switzerland also lacks a rule on related actions in non-Lugano Convention cases. However, the parties may solve the problem by agreeing to stay proceedings until a related cause of action has been decided by a foreign court seised of the cause of action.

German law does not allow for suspension of the domestic proceedings because of their connection with a foreign pending action. But if the decision of the lawsuit *depends* on the outcome of another pending proceeding (which may be foreign) section 148 of the Code of Civil Procedure (ZPO) permits the suspension of the domestic proceedings.

(b) CONSOLIDATION OF ACTIONS

An entirely different approach towards related actions is for the forum to accept jurisdiction over both actions. Many States have provisions which allow this.

[159] See below, p. 337.
[160] Art. 7 of the proposed Italian Conflict of Laws Statute.
[161] See below, p. 314.

Article 3139 of the Civil Code of Quebec provides that: 'Where a Quebec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.'[162] This provision can be invoked where two actions, which may involve different objects or parties, are none the less linked, so that it is difficult to decide one action separately from the other. It can be used to attribute jurisdiction not only to a local court but also to a foreign court if there is a connection between the action and that court. Quebec also has provisions in its Code of Civil Procedure which might be used to allow joinder of actions in cases of connexity (actions having such a close connection that the decision in the first will have a consequence on the second).

The concept of joinder of actions is to be found in Article 6 of the Brussels and Lugano Conventions. Article 6(1) deals with multi-defendant cases and provides that a person domiciled in a Contracting State may also be sued, where he is one of a number of defendants, in the courts for the place in which any one of them is domiciled. The European Court of Justice has held that the actions against the different defendants must be related to the extent that it must be expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.[163]

Italian law (in non-Convention cases) also allows for the consolidation of related claims. Thus the litigation of one dispute before an Italian court may form the basis for jurisdiction over another related dispute.[164]

Argentinian law has a doctrine of *litispendencia* by connexity. This applies where one of the three elements (same parties, object, cause) for *lis pendens* (*litispendencia* by identity) is missing. Under this rule the Argentinian court will order the 'accumulation of the proceedings'.

Greek law provides for the exclusive jurisdiction of connexity. Article 31 of the Code of Civil Procedure provides that auxiliary claims are tried before the courts having jurisdiction over the main claim: 'main claims related between them are submitted to the exclusive competence of the first-seised court.'

Article 22(2), of the Brussels and Lugano Conventions deals with declining jurisdiction where the court first seised has jurisdiction over both actions by stating that: 'A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.'

[162] Scotland has a similar rule under its non-Brussels/Lugano Convention rules: see s. 22(4), Civil Jurisdiction and Judgments Act 1982.

[163] Case 189/87 *Kalfelis* v. *Bankhaus Schröder* [1988] ECR 5565.

[164] Art. 4, n°. 2, Code of Civil Procedure.

V
FOREIGN CHOICE OF JURISDICTION AGREEMENTS

1. Effect of the Agreement

There is a very clear difference between common law jurisdictions and other States when it comes to the effect given to an agreement conferring jurisdiction on the courts of a foreign State. In common law jurisdictions there is a power to decline jurisdiction but this is discretionary, and a court can, nonetheless, allow the local proceedings to continue, despite the parties' agreement on trial abroad. In other States the declining of jurisdiction is compulsory or, even more fundamentally, the State may have no jurisdiction. The common law discretionary rule and the compulsory declining/no jurisdiction rule of other States will now be examined.

(a) A discretion to stay

Under English law the rule set out in the leading case of *The Eleftheria*[165] is that, where a plaintiff sues in England in breach of an agreement to refer disputes to a foreign court, the English court has a discretion whether to stay the English proceedings or not. However, the discretion should be exercised by granting a stay unless strong cause for not doing so is shown. The burden of showing this is on the plaintiff. In exercising this discretion the court will take into account a number of considerations, which are essentially the same as those taken into account under the English doctrine of *forum non conveniens*.[166]

New Zealand case law[167] on foreign jurisdiction clauses is based on *The Eleftheria*. Likewise, this case provides the guidelines for Australian courts. Canadian courts in the common law jurisdictions have also followed the English rule and require strong reasons, from the point of view of convenience or the interests of justice, for allowing the action to proceed in the face of a foreign jurisdiction clause. Examples[168] of where the action was allowed to proceed include the situation where litigation in the foreign court would have led to a multiplicity of proceedings, where the plaintiff could not have compelled its key witnesses to testify in the

[165] [1970] P 94. See also *The El Amria* [1981] 2 Lloyd's Rep. 119 (CA); *The Pioneer Container* [1994] 2 All ER 250 (PC).

[166] See below, pp. 223–4.

[167] See e.g. *Apple Computer Inc* v. *Apple Corp SA* [1990] 2 NZLR 598. *The Eleftheria* is also followed in Singapore: *The Vishva Apurva* [1992] 2 SLR 175 (CA).

[168] See below, pp. 137–8.

agreed forum, and where the plaintiff, being relatively impecunious, would have difficulty in suing in the agreed forum.

Israeli law is essentially the same as that in England, so that an Israeli court will dismiss the action where there is a foreign jurisdiction agreement unless there are special circumstances. A good example of such special circumstances is the situation where the plaintiff is unable to bring his action abroad or would be faced with clearly demonstrable discrimination. This was shown in a case where the other State involved was Iraq.[169]

In the United States choice of forum clauses are generally upheld. In *Bremen* v. *Zapata Off-Shore Co* the Supreme Court of the United States held that a foreign forum-selection clause is binding on the parties unless the plaintiff can show that its enforcement would be unreasonable and unjust.[170] The attitude in the United States, as in other common law jurisdictions, is that the parties should normally abide by their agreement. Indeed, the Supreme Court described its approach as being 'substantially that followed in other common law countries including England'.

(b) MANDATORY DECLINING OF JURISDICTION/NO JURISDICTION

In non-common law jurisdictions, there is no discretionary power to allow the proceedings to continue in cases where there is a foreign choice-of-jurisdiction agreement. A local court cannot try the case. The effect is that the court has no jurisdiction or that it must decline jurisdiction.

Thus under German law the effect of a foreign choice of jurisdiction agreement is the *ex officio* dismissal of the local claim as inadmissible. Similarly, under Dutch, Swiss, Greek, Finnish, and Japanese law the effect is that a local court must decline jurisdiction/dismiss the action. Under Article 17 of the Brussels and Lugano Conventions, if the parties have agreed that a court or the courts of a Contracting State are to have jurisdiction, that court or those courts have exclusive jurisdiction. This means that courts in other Contracting States are deprived of jurisdiction. French law (in non-Convention cases) likewise gives exclusive jurisdiction to the designated court, provided a number of conditions are met.[171] This means that, if the parties have agreed on trial abroad and these conditions are met, a French court has no jurisdiction. However, if these conditions are not met, the jurisdiction agreement has no effect. Argentinian law is the same.[172] Under Italian law (in non-Convention

[169] *Oneon Insurance Co Ltd* v. *Moshe*, 17 PD 646 (1963). [170] 407 US 1 at 1 (1972).

[171] Cass. Fr., lère ch. civ., 17 Dec. 1985, *CSEE* v. *Soc Sorelec* [1986] Dalloz inf. rap. 265, observ. B. Audit; [1986] *Rev. crit. de dr. internat. pr.* 537, note H. Gaudemet-Tallon; B. Ancel et Y. Lequette, *Grands arrêts de la jurisprudence française de droit international privé* (2nd edn., 1992), 68. The conditions are considered below, pp. 183–4.

[172] *Quilmes Combustibles* v. *Vigon SA*, 15 Mar. 1993.

cases) a court lacks jurisdiction when there is a valid foreign choice of jurisdiction agreement.

Article 17 goes on to deal with the situation where neither party is domiciled in a Contracting State. Here, the agreement does not give exclusive jurisdiction. Its effect is more limited than this, so that 'the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.'

The position under Quebecois law is more complicated. Under Article 3148 of the Civil Code a Quebecois authority has no jurisdiction where the parties have agreed to submit a dispute between them to a foreign authority. Nonetheless, it is suggested[173] that Quebecois courts still retain discretionary powers, given by certain other provisions in the Civil Code, for example to take measures to protect a person or his property in Quebec in case of emergency.

(c) RECOGNITION AND ENFORCEMENT

A choice of jurisdiction clause can have an effect at the stage of recognition and enforcement of foreign judgments. If an action is brought in State A in breach of a choice of jurisdiction agreement, conferring jurisdiction on the courts of State B, the result is that some States will not recognize and enforce the judgment given in State A. There are statutory provisions to this effect under English,[174] United States,[175] and Quebecois law.[176] Under French law the position is the same, even though there are no statutory provisions on this. It is noticeable, however, that the Brussels and Lugano Conventions contain no such provision.

2. THE AGREEMENT

Not every foreign choice of jurisdiction agreement produces the effect outlined above. In order to do so, it has to satisfy certain requirements. Of course, what these are differs from one State to another, but some of the more commonly found requirements are listed below.

(a) AN AGREEMENT CONFERRING JURISDICTION ON THE COURTS OF A STATE

The English Court of Appeal[177] has held that the *agreement* must be an express one; it cannot be implied. There was no implied choice of jurisdic-

[173] See below, pp. 164–5.
[174] S. 32, Civil Jurisdiction and Judgments Act 1982.
[175] See the Uniform Foreign Money-Judgments Recognition Act, adopted by 23 States.
[176] Art. 3165, Civil Code.
[177] *New Hampshire Insurance Co* v. *Strabag Bau AG* [1992] 1 Lloyd's Rep. 361 at 371.

tion by virtue of the fact that a company was resident in England or by reason of the presence of brokers. However, an express agreement may take an indirect form. According to the European Court of Justice, for the purposes of Article 17 of the Brussels Convention, it can include a jurisdiction clause in the articles of association of a company.[178]

The agreement must confer jurisdiction on the *courts* of a State. According to Greek law, the agreement does not have to determine in advance and by name the concrete court of the foreign State selected; it is enough that the clause permits the foreign court to be determined subsequently under the relevant procedural rules of the chosen State.[179]

Under Article 17 of the Brussels and Lugano Conventions the *State* in question must be a Contracting State, i.e. an EC or EFTA State.

(b) EXCLUSIVE AND NON-EXCLUSIVE JURISDICTION CLAUSES

When it comes to determining whether an agreement is an exclusive or non-exclusive one, the English courts have held that this is a matter for the law governing the agreement. If the parties' contract also contains a choice of law clause, then under English law the jurisdiction clause is regarded as being an exclusive one.[180] This rather wide interpretation of the parties' intentions contrasts with the position in Germany. There, the majority view is that in cases of doubt the assumption is that the parties intended only a simple, non-exclusive agreement. Likewise, in Israel, a clause will only be interpreted as an exclusive one if it expressly so states or that is clearly the necessary intention of the parties; the Israeli Supreme Court has been known to strain in order to interpret a clause as not conferring exclusive jurisdiction.[181]

The distinction between exclusive and a non-exclusive jurisdiction is not a vital one under English law. While it should, in principle, be easier for the plaintiff to convince the court to allow an action in England to proceed when the clause conferring jurisdiction on the foreign court is an exclusive one, recent English decisions have said that, even with a non-exclusive jurisdiction clause, it will take strong reasons not to hold the parties to their agreement.[182]

The position in New Zealand is different. A non-exclusive jurisdiction clause will not prevent a New Zealand court from exercising jurisdiction.

[178] Case C–214/89 *Powell Duffryn Plc* v. *Petereit* [1992] ILPr. 300.
[179] See the Areopagus judgment, No. 4/1992, No. B 40 (1992), 707.
[180] *British Aerospace Plc* v. *Dee Howard Co* [1993] 1 Lloyd's Rep. 368.
[181] *Korpol* v. *Horowitz*, 34 (1) PD 260 (1979).
[182] *Berisford (S & W) plc* v. *New Hampshire Insurance Co* [1990] 2 QB 631; *Standard Steamship Owners Protection & Indemnity Association (Bermuda Ltd)* v. *Gann* [1992] 2 Lloyd's Rep. 528. In Australia the burden of adducing evidence justifying trial when there is a foreign choice of jurisdiction agreement is even heavier when it is an exclusive jurisdiction agreement.

It merely indicates that there is an alternative forum abroad when it comes to applying the doctrine of *forum non conveniens*. Similarly, under Canadian law (common law jurisdictions), non-exclusive jurisdiction clauses simply come within the doctrine of *forum non conveniens*, rather than being the basis of some special rule for choice of jurisdiction clauses.[183] Under Scots law less weight is given to a non-exclusive jurisdiction clause than it is in England.[184] Israeli law appears to go even further than this for, when it comes to dismissal, it seems to be only concerned with the effect of exclusive jurisdiction agreements.

In States which have no doctrine of *forum non conveniens* the distinction between an exclusive and a non-exclusive jurisdiction clause can assume even greater importance. Thus, under German law, derogation only takes effect if the parties have agreed that the courts of a State shall have exclusive jurisdiction. The same position is taken under Japanese law, Dutch law,[185] and under the Hague Convention on the Choice of Court, concluded in 1965. According to Article 6, 'Every court other than the chosen court or courts shall decline jurisdiction except—(1) where the choice of court made by the parties is not exclusive.' However, this Convention has only been adopted by Israel and has never come into force.

By way of contrast, it should be noted that under French law no distinction is drawn between exclusive and non-exclusive jurisdiction clauses; all valid clauses confer an exclusive jurisdiction.

The position under the Brussels Convention is less clear. We know that, for agreements conferring jurisdiction coming within Article 17, the effect is to give exclusive jurisdiction. However, Article 17 does not make it clear whether it is referring to exclusive or non-exclusive jurisdiction agreements. It is true that an English court has held that a non-exclusive English jurisdiction clause gives jurisdiction to the English courts.[186] But it is not clear whether it gives exclusive jurisdiction i.e. are courts in other Contracting States prohibited from trying the case? It would be very odd to give exclusive effect to a non-exclusive agreement. The German reporter is of the view[187] that Article 17 allows the parties to agree on a non-exclusive jurisdiction agreement. This does not give exclusive jurisdiction, but only provides an additional forum so that other Contracting States may hear the case on some other basis provided for by the Convention.

[183] *PWA Corp* v. *Gemini Group Automated Distribution Systems Inc* (1992) 98 DLR (4th) 227. This may very well also happen in Quebec, where there is no authority on the point.

[184] *Scotmotors (Plant Hire) Ltd* v. *Dundee Petrosea Ltd*, 1980 SC 351; *Morrison* v. *Panic Link Ltd*, 1993 SLT 602.

[185] *The Harvest Trader* case, HR, 28 Oct. 1988, [1989] NJ 765.

[186] *Kurz* v. *Stella Musical Veranstaltungs GmbH* [1992] Ch. 196; followed in *Gamlestaden* v. *CDS* [1994] 1 Lloyd's Rep. 433.

[187] See below, pp. 200–1.

Under Swiss private international law it is accepted that a non-exclusive jurisdiction clause will not be given exclusive effect. This is apparent from the Swiss Private International Law Statute of 1987 which provides that 'Unless otherwise provided by the agreement, the choice of jurisdiction is exclusive.'[188]

(c) A VALID AGREEMENT

It is an obvious requirement that the agreement must be a valid one. This has two aspects. First, a valid agreement must have been created. An agreement may be invalid under United States law because of fraud or overreaching.[189] Similarly, under French law, a jurisdiction clause will not give exclusive competence to the designated court when there is fraud. Secondly, even where the normal requirements for formation of a valid agreement have been satisfied, a statutory provision limiting the effectiveness of choice of jurisdiction clauses may render the agreement invalid. This second aspect will be examined later.[190]

Difficult choice of law questions can arise regarding the law governing the validity of the agreement. In certain common law (for example, England) and civil law (for example, Belgium) jurisdictions, it is not entirely clear whether the courts should apply the *lexi fori*, the law applicable to the jurisdiction agreement, or some other law, to issues of validity.[191]

(d) FORMAL REQUIREMENTS

The best known of these are to be found in Article 17 of the Brussels and Lugano Conventions which requires that the agreement must be (i) in writing or evidenced in writing, or (ii) in a form which accords with practices which the parties have established between themselves, or (iii), in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

The requirement of writing is to be found elsewhere, for example under Swedish law[192] and Italian law (in non-Convention cases). Also Article 5(1) of Switzerland's Private International Law Statute states that:

[188] Art. 5(1). [189] *The Bremen*, n. 170 above. [190] Below, pp. 55–6.

[191] For England see Dicey and Morris, *The Conflict of Laws*, n. 38 above, 422–3; for Belgium, see below, p. 112.

[192] The analogy is drawn of Ch. 10, s. 16 of the Code of Judicial Procedure.

'The agreement may be made in writing, by telegram, by telex, telecopier or any other means of communication which permits it to be evidenced by a text.'

Japanese law is more flexible in relation to formalities in international cases than it is in internal cases involving venue provisions. It is enough if a court of a State is expressly designated on the document prepared by either of the parties, and if the existence of such an agreement between the parties and its contents are made explicit.[193]

A German court will apply the German *lex fori derogati* to ascertain whether a foreign forum selection clause is formally valid. If, however, the foreign court (on which jurisdiction is conferred) holds the prorogation invalid by applying its own law, then as a matter of construction the derogation of the German courts also ceases to have effect.

(e) OTHER REQUIREMENTS

There is a wide range of other requirements laid down by different States for an effective choice of jurisdiction agreement. For example, under French law there must be an international dispute. Article 17 of the Brussels and Lugano Conventions requires, for an agreement to give exclusive jurisdiction, that one of the parties must be domiciled in a Contracting State.[194] Italian law (in non-Convention cases) imposes very strict restrictions in relation to foreign choice of jurisdiction agreements. There is no ouster of the Italian courts' jurisdiction unless the parties to a dispute are foreign nationals, or a foreign national and an Italian subject neither resident nor domiciled within the territory of the Italian State.[195]

(f) NO NEW AGREEMENT

A new choice of forum agreement may supersede the original agreement. This is the position under Quebecois law.[196] Swiss law provides that an unconditional appearance is equivalent to a new choice of forum agreement. German law is to the same effect, and if a defendant argues on the merits without attacking the derogated court's lack of jurisdiction, this constitutes a new agreement. The same line has been followed under the Brussels Convention. The European Court of Justice had held that the

[193] Sup. Ct. judgment of 28 Nov. 1975, *Koniglike Java China Paletvaat lijnen BV Amsterdam (Royal Interocean Lines)* v. *Tokyo Marine and Fire Insurance Co* (1976) 20 Japanese Annual of International Law 106.

[194] If this condition is not satisfied Art. 17(2) operates to deny jurisdiction to other Contracting States unless the court chosen has declined jurisdiction.

[195] Art. 2, Code of Civil Procedure 1942.

[196] See Art. 3148, Civil Code.

defendant's submission to the courts of a Contracting State under Article 18 of the Brussels Convention overrides an agreement conferring jurisdiction under Article 17.[197]

3. Limitations on Effectiveness

Even if a valid choice of jurisdiction agreement has been created by the parties, that agreement may be ineffective. Many States impose limitations on the effectiveness of foreign choice of jurisdiction agreements. However, the nature of such limitations does vary very much from one State to another and, indeed, some States impose many more limitations than others.

Before looking at examples of limitations on effectiveness, it is important to make one general point, by way of introducing some balance into the discussion. The parties have the freedom to choose to have their dispute tried before the courts of a State with which there is no connection. Thus French, German, and English law respect the parties' interest in having trial in a neutral forum. Indeed, many cases tried in the Commercial Court in London involve parties, neither of whom is English, who have agreed on trial in England.

(a) *FORUM NON CONVENIENS*

Common law jurisdictions, by operating a discretionary rule in relation to foreign choice of jurisdiction agreements, are actually imposing a *forum non conveniens* limitation on the effectiveness of the agreement of the parties. Thus, under United States law, there is a limitation on the effectiveness of the agreement, in that it will not be enforced where it would be unreasonable and unjust to do so.

(b) PUBLIC POLICY/*ORDRE PUBLIC*

The leading Japanese case in this area has held that an exclusive jurisdiction agreement should be valid in principle unless this would lead to an unacceptable result which violates public policy.[198] The Finnish doctrine of *ordre public* enshrines the principle that any clause of a contract may be adjusted on grounds of inequity.[199] Under United States law there is likewise a rather imprecise restriction on foreign choice of jurisdiction agreements, in that they must not contravene an important public policy of the forum.[200]

[197] Case 150/80 *Elefanten Schuh GmbH* v. *Jacqmain* [1981] ECR 1671.
[198] Sup. Ct. judgment of 28 Nov. 1975, n. 193 above.
[199] Contract Act, s. 36.
[200] *The Bremen*, n. 170 above.

(c) NEGOTIATING POWERS

Under Argentinian law the courts will pay special attention to the negotiating powers of the parties in the situation in which a neutral forum has been chosen.

(d) ABUSIVE DEPRIVATION OF PROTECTION

Article 5(2), of the Swiss Private International Law Statute provides that: 'A choice of jurisdiction is ineffective if a party is abusively deprived of protection at a place of jurisdiction provided by Swiss law.' This provision is concerned to ensure that a person is not deprived of a Swiss forum by means of unfair stipulations or terms of trade.

(e) AN INACCESSIBLE FOREIGN FORUM

A Swiss court can still base jurisdiction on necessity in cases where the court on which jurisdiction has been conferred is inaccessible because of war, catastrophe, or similar disaster.[201] The position appears to be similar under German law where, in very special circumstances, frustrated choice of jurisdiction agreements will be corrected.

(f) SPECIFIC CONTRACTS

(i) Carriage by Sea

The Swedish Maritime Act of 1994 restricts in certain respects the parties' freedom to confer jurisdiction on a State in cases involving contracts for the carriage of passengers and luggage by sea.[202] In England an exclusive jurisdiction clause has been held, by the House of Lords,[203] to be null and void and of no effect by virtue of the Hague–Visby Rules, which have been implemented by the Carriage of Goods by Sea Act 1971. New Zealand law is similar, and the courts cannot give effect to an agreement purporting to oust their jurisdiction in respect of a bill of lading relating to carriage of goods by sea to or from New Zealand.[204]

(ii) Employment Contracts

These involve a weaker-party relationship, and a number of States provide special protection for the employee in this situation. Greek law contains a special provision which renders a foreign choice of jurisdiction agreement null and void in cases where Greek citizens are employed by

[201] Art. 3 of the Swiss Private International Law Statute of 1987.
[202] Ch. 21, s. 4 of the Swedish Maritime Act of 1994.
[203] *The Hollandia* [1982] 1 AC 565. [204] S. 11A, Carriage of Goods Act 1940.

enterprises, with a seat or doing business in Greece, to work in Africa or Asia.[205]

Article 17 of the Brussels Convention states that:

> In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seise courts other than those for the defendant's domicile or those specified in Article 5(1) [special jurisdiction in matters relating to a contract].[206]

Article 17 of the Lugano Convention is much more restrictively worded and gives the agreement conferring jurisdiction legal force only if it is entered into after the dispute has arisen.

Swedish case law in non-Lugano Convention cases contains an important exception to the freedom of the parties to oust the Swedish courts' jurisdiction in employment cases. Thus the Swedish Labour Court has refused to be bound by a foreign choice of jurisdiction clause in a case involving an employment contract between a Swedish employee working in Sweden and her Swiss employer.[207] In order that her interests could be protected, the employee had to be able to sue in Sweden.

(iii) Consumer Contracts

These, too, involve a weaker-party relationship, with a number of States providing special protection for the consumer. Thus Article 114(2) of the Swiss Private International Law Statute provides that: 'the consumer may not waive in advance the jurisdiction at his domicile or his habitual residence.' A similar provision is to be found under Quebecois law.[208] Article 15 of the Brussels and Lugano Conventions sets out restrictions on when the special jurisdictional rules for consumer contracts contained in Articles 13 and 14 may be departed from by an agreement.

(iv) Insurance Contracts

Article 12 of the Brussels and Lugano Conventions sets out restrictions on when the special jurisdiction rules for insurance contracts contained in Section 3 may be departed from by an agreement.

(v) Non-financial Disputes

German law has a very wide restriction on ouster of local jurisdiction, in that this is not allowed in non-financial disputes.[209]

[205] See ss. 1 and 2 of art. 4 of Act 1429/1984 in [1984] Kodex No B 327 ff.

[206] This provision was added by the Spanish/Portuguese Accession Convention of 1989, which has yet to be ratified by Belgium, Denmark, and Germany.

[207] *Hapimag* v. *Mona Mårtensson* [1976] AD 101.

[208] Art. 3149, Civil Code. This provision protects workers as well as consumers and states that 'the waiver of . . . jurisdiction by the consumer or worker may not be set up against him'.

[209] S. 40, II 1 ZPO.

(g) EXCLUSIVE JURISDICTION

A commonly found restriction on the effectiveness of a foreign choice of jurisdiction agreement is that it cannot oust the forum's jurisdiction when this is exclusive. Thus Article 17(3) of the Brussels and Lugano Conventions provides that the courts which have exclusive jurisdiction under Article 16 cannot be deprived of it by an agreement under Article 17, and any agreement which purports to do so shall have no legal force. Germany, The Netherlands, Sweden, and Finland all, seemingly, appear to give priority to the jurisdiction of the forum when this is exclusive, even in non-Convention cases. The same is true under Japanese and Argentinian law. According to the *Première chambre civile* in *Cie de signaux et d'entreprises électriques (CSEE)* v. *Soc Sorelec*,[210] under French law one of the conditions which a foreign jurisdiction clause has to comply with is that it does not deny application of the mandatory territorial competence of a French court.

Contrast the position under Greek law, where foreign choice of jurisdiction agreements are upheld even if they oust an exclusive Greek jurisdiction.

4. FORUM CHOICE OF JURISDICTION AGREEMENTS

(a) A DISCRETION TO DECLINE JURISDICTION

In common law jurisdictions the forum court can decline jurisdiction, using its discretionary powers, even though the parties have agreed on trial in the forum. A New Zealand court on which exclusive jurisdiction has been conferred by the parties will normally exercise such jurisdiction. However, a defendant may obtain a dismissal or stay if he can show strong cause why trial in New Zealand is not in the interests of the parties and of the ends of justice.[211] Likewise, in the United States, forum-selection is binding on the parties unless the defendant can show that its enforcement would be unreasonable, unfair, or unjust.[212] The position is similar in England, although it would be unusual for an English court to decline jurisdiction on the ground of *forum non conveniens* in a case involving an English choice of jurisdiction clause.[213] Nor would it normally refuse to allow service of a writ out of the jurisdiction under Order 11 of the Rules of the Supreme Court in such a case. According to Israeli law, the defendant has an unusually heavy burden to convince the court to decline jurisdiction on the basis of *forum non conveniens* in the situation where there has been prior contractual consent to jurisdiction in Israel.[214]

[210] N. 171 above. The other requirement is that the dispute must be an international one.
[211] See *Bramwell* v. *The Pacific Lumber Co Ltd* (1986) 1 PRNZ 307 at 311–2.
[212] *The Bremen*, n. 170 above. [213] Cheshire and North, n. 38 above, 225.
[214] *Multi-lock Inc* v. *Rav-bariach, Ltd*, 36(3) PD 272 (1982).

More interestingly, in some civil law jurisdictions the courts may decline jurisdiction. Thus, a Swiss court may decline to accept jurisdiction under a Swiss jurisdiction clause, although this is subject to a number of provisos, such as there being no international convention or statute preventing this.[215] Similarly, under Dutch law there is a discretion whether to try a case if there is an agreement conferring jurisdiction on a Dutch court.[216]

(b) NO DISCRETION

The alternative approach towards forum choice of jurisdiction agreements is to adopt a compulsory rule whereby such agreements confer jurisdiction and there is no discretion to decline this. The best example of this is contained in Article 17 of the Brussels and Lugano Conventions. An agreement that meets the requirements of Article 17 confers jurisdiction, there being no power to refuse to try the case. An English court has held that even an English non-exclusive jurisdiction agreement confers jurisdiction on the English courts under Article 17.[217]

VI
ARBITRATION AGREEMENTS

1. EFFECT OF THE AGREEMENT

When it comes to arbitration agreements, the position is very different from that in cases involving choice of jurisdiction agreements. Even in common law jurisdictions, it is only in very limited circumstances that a court will exercise a discretionary power to stay proceedings. Normally what happens is that a court must decline jurisdiction when faced with an arbitration agreement. The provisions which require this will be examined first, and then attention will turn to the limited circumstances in which discretionary powers to decline jurisdiction operate in the context of arbitration agreements.

(a) MANDATORY DECLINING OF JURISDICTION

For the very many States which have implemented either the New York Convention on the Recognition and Enforcement of Foreign Arbitral

[215] Art. 5(3) of the Swiss Private International Law Statute of 1987 provides that 'The court chosen may not decline jurisdiction: (a) if one of the parties has its domicile, habitual residence, or business establishment in the canton of the chosen court, or (b) if this Statute declares Swiss law applicable to the case.'

[216] *The Piscator* case, HR, 1 Feb. 1985, [1985] NJ 698, [1989] NILR 59.

[217] N. 186 above.

Awards of 1958 or the UNCITRAL Model Law on International Commercial Arbitration of 1985, the position is clear. A court, when faced with an arbitration agreement, must decline jurisdiction. All the States represented in the National Reports are, in fact, parties to either the New York Convention or, less commonly, the UNCITRAL Model Law.

(i) The New York Convention

Many common law jurisdictions have implemented this Convention. Thus England has substantially given effect to Article II of the New York Convention,[218] as have Australia, New Zealand,[219] Israel, and the United States.[220] This Convention has also found favour outside common law jurisdictions in Argentina, Belgium, Finland, France, Germany, Greece, Italy, Japan, The Netherlands, and Sweden. Switzerland[221] and France[222] have enacted provisions which are similar, albeit not identical, to those contained in the Convention.

Article II(3) of the Convention states that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

(ii) The 1985 UNCITRAL Model Law

Scotland has given effect to this Model Law,[223] with certain modifications. Likewise, all Canadian jurisdictions (including Quebec) have enacted it to govern international arbitration. In New Zealand the Law Commission has prepared a draft Arbitration Act, the intention being that it shall provide for application of the principles of the Model Law to both international and domestic arbitrations.

The Model Law has a provision which is very similar to Article II(3) of the New York Convention. Article 8 states that:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[218] S. 1, Arbitration Act 1975.
[219] The Arbitration (Foreign Agreements and Awards) Act 1982.
[220] Ch. 2 of the Federal Arbitration Act.
[221] See Art. 7 of the Swiss Private International Law Statute of 1987.
[222] See Art. 1458, New Code of Civil Procedure.
[223] Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

(b) A DISCRETION TO STAY

Some common law jurisdictions still exercise a discretionary power to stay proceedings in certain limited circumstances. Under English law this power exists in the case of a domestic arbitration agreement.[224] It is exercised on the same principles as apply in relation to foreign jurisdiction agreements.[225] New Zealand law is to the same effect.[226] Under Australian law, although the power to stay is discretionary in relation to domestic arbitration agreements, the court will almost always grant the stay. Moreover, the English courts have an inherent discretionary power, exercised on the same principles, to stay proceedings brought before them in breach of an agreement to decide disputes by an alternative method (in the leading case by a dispute-resolution agreement), even if this is not an effective agreement to arbitrate.[227]

Under Scots law if the arbitration agreement does not come within the scope of the Model Law,[228] then the Scots courts have a discretion to decline to exercise jurisdiction.

Under United States law the mandatory stay of proceedings under legislation giving effect to the New York Convention requires a determination from the court that an agreement to arbitrate was made and breached; prior to this determination a court can dismiss a petition to compel arbitration on *forum non conveniens* grounds.

2. THE AGREEMENT

Some of the more commonly found requirements, needed before the agreement can have the above effect, are as follows:

(a) AN ARBITRABLE DISPUTE

The agreement must relate to an arbitrable dispute. The UNCITRAL Model Law requires that the arbitration must be a commercial one.[229] Argentinian law has a requirement to the effect that only pecuniary matters are arbitrable, thereby excluding such matters as divorce or custody. Swedish law imposes certain restrictions on what is arbitrable,

[224] See s. 4(1), Arbitration Act 1950. A domestic arbitration agreement is defined under s. 1(4), Arbitration Act 1975.
[225] N. 165 above, at 100. [226] Arbitration Act 1908.
[227] *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334.
[228] Or s. 1, Arbitration Act 1975. [229] Art. 1(1).

for instance regarding disputes between business enterprises and consumers.

(b) A VALID AGREEMENT

It is an obvious requirement that the arbitration must be a valid one. This has been spelled out under the New York Convention and the UNCITRAL Model Law; the mandatory declining of jurisdiction by a court is subject to the identical proviso, i.e. unless it finds that the agreement 'is null and void, inoperative or incapable of being performed'.[230] Under Italian law an arbitral agreement is inoperative where the award resulting from the proceedings will not be recognized and enforced in Italy as the territory of the State where recognition of the ousting effect of the agreement is sought. In common law jurisdictions the agreement must be valid according to the law that is applicable to it. However, in some other States, for example, Greece, the prevailing view is that this is a matter for the *lex fori*.

(c) IN WRITING

Both the New York Convention and the UNCITRAL Model Law require an agreement in writing. The former states that this 'shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'.[231] The UNCITRAL Model Law provision is similar.[232]

(d) INTERNATIONAL

It is a requirement under the UNCITRAL Model law that the arbitration be international.[233] Simiarly, under the English legislation implementing the New York Convention it is required that the agreement be a non-domestic one.[234] Argentinian law requires that the dispute be of an international nature.

(e) RAISED AS A DEFENCE

It is a requirement under the law of a number of States such as Germany, Greece, and The Netherlands that the agreement must be raised as a defence by a party, rather than being considered *ex officio* by the court.

[230] Art. II, para. 3, of the New York Convention; Art. 8(1) of the UNCITRAL Model Law.
[231] Art. II, para. 2. [232] Art. 7(2). [233] See Art. 1(1).
[234] S. 1(2)(4), Arbitration Act 1975.

3. Limitations on Effectiveness

Once a valid agreement on arbitration has been created, there are very few circumstances in which it will be ineffective. None the less, a few examples can be found. Under Dutch law, a party must be acting in accordance with requirements of reasonableness and equity in holding the other party to the agreement. These requirements were not met where in a small claims dispute, in order to enter arbitration, the plaintiff had to pay 5,000 guilders in advance.[235] Similarly, under the law of Finland an arbitration clause may be adjusted on grounds of inequity. Finally, under German law, in exceptional cases a party's reliance on an arbitration agreement can be malicious and without effect if that party is not able to meet the costs of the arbitration proceedings.

VII
FORUM-SHOPPING ABROAD

1. Introduction

So far, what has been considered is the forum declining its own jurisdiction. A very different problem is that of how the forum should react in the situation where there is a trial abroad, when this involves forum-shopping and injustice to the defendant in the foreign proceedings. There are two alternative ways in which a State could deal with this problem. It could either restrain the foreign proceedings or refuse to recognize and enforce the foreign judgment. The first method seeks to solve the problem directly; the second indirectly.

The first method involves the exercise by the court of a discretion, and it comes as no surprise to find that, by and large, States which have adopted a doctrine of *forum non conveniens* have also adopted this method for dealing with forum-shopping and injustice abroad. At the same time, there is a great difference between a court declining its own jurisdiction and seeking to restrain foreign proceedings. Although in common law jurisdictions the restraint is carried out by means of an injunction,[236] which operates *in personam* (against one of the parties), this is, nonetheless, an indirect interference with the jurisdiction of the foreign court. It is for this reason that any power to restrain foreign proceedings is exercised with caution. It also has to be admitted that there are practical problems with

[235] Kantongerecht Zierikzee, 19 Feb. 1988, [1988] Praktijkgids 2870, 268.

[236] Compare the position in Argentina where there are some procedural rules which allow the courts to restrain foreign proceedings, but there is no discretionary power to restrain by injunction.

this method. If the defendant is out of the jurisdiction and has no assets within it, proceedings for contempt of court for breach of the injunction become meaningless.

It also comes as no surprise to find that States which have not adopted a doctrine of *forum non conveniens* have dealt with the problem of forum-shopping and injustice abroad at the stage of recognition and enforcement of the foreign judgment.

2. Restraining Foreign Proceedings

A similar pattern emerges to that observed in relation to *forum non conveniens*. Britain has taken a lead, which has been followed in other Commonwealth States. The United States have their own distinctive criteria for restraining foreign proceedings. Quebec and Japan have adopted criteria which are different from each other and from those adopted in the common law jurisdictions.

(a) Britain and some other Commonwealth States

Under English law a distinction is drawn between, on the one hand, the situation where there are two or more available fora for trial (one of which is England) and, on the other hand, the situation where the only available forum is abroad. The former situation is far more common and will be concentrated on in this Report. At one time, the English courts applied essentially the same criteria for restraining foreign proceedings as for staying their own proceedings.[237] The *Spiliada* case changed all that. The *Spiliada* criteria, if unthinkingly applied to the area of restraining foreign proceedings, would have led to English courts restraining foreign proceedings on the mere basis that the natural forum for trial was England. In the leading case of *Société Nationale Industrielle Aérospatiale* v. *Lee Kui Jak*,[238] the Privy Council held that what needs to be shown, as a general rule, is that England is the natural forum for trial *and* that it would be oppressive or vexatious to permit the defendant to continue with the proceedings abroad. The reference to the natural (or clearly appropriate) forum is interesting because of the importance attached to this concept under the English doctrine of *forum non conveniens*. It can therefore be seen that there is still some overlap in the criteria used for staying local proceedings and those for restraining foreign proceedings. It looks to be wrong in principle for an English court to grant an injunction restraining foreign proceedings in another Western European State, when that State has been allocated jurisdiction under the Brussels or Lugano Convention.[239] The

[237] *Castanho* v. *Brown and Root (UK) Ltd* [1981] AC 557.
[238] [1987] AC 871. [239] See Cheshire and North, n. 38 above, 250–1.

English Court of Appeal has recently granted an injunction restraining Greek proceedings; however, this was in the situation where the English courts had exclusive jurisdiction under Article 17 of the Brussels Convention.[240]

A Scottish court in *Pan American World Airways* v. *Andrews*[241] has followed the *Société Nationale Aérospatiale* case, as well as earlier Scottish authority.

In New Zealand the law on restraint of foreign proceedings is identical to that in England, since the *Société Nationale Aérospatiale* case is accepted as being a binding precedent.

That case has also been followed in Australia[242] and in Singapore.[243]

The Supreme Court of Canada in *Amchem Products Inc* v. *British Columbia (Workers Compensation Board)*[244] were very much influenced by the *Société Nationale Aérospatiale* case, and the principles it sets out were taken as the foundation for the test to be applied in Canada. However, there are three clear differences between the Canadian and English doctrines.

First, in Canada the courts ask whether the foreign forum is *forum non conveniens*, rather than whether the local forum is the natural forum for the trial.

Secondly, when it comes to the trial abroad, the language of vexation and oppression is not used in Canada. An injunction will only be granted if the foreign court's assumption of jurisdiction was inequitable, i.e. an injustice results to a litigant or would-be litigant before the Canadian courts.

Thirdly, in examining the question of injustice, the domestic court should weigh up the loss of advantage to the foreign plaintiff if the injunction is granted, against the loss of advantage to the defendant if the action is tried abroad.

(b) THE UNITED STATES

A United States court will grant an injunction restraining a person from proceeding with an action abroad if it is satisfied that a refusal to grant the injunction will cause irreparable harm to the person seeking the injunction and will not impose undue hardship on the person against whom the injunction is sought.[245]

[240] *Continental Bank NA* v. *Aeakos Compania Naviera SA* [1994] 1 WLR 588. See the criticism by Bell, (1994) 110 *LQR* 204; Rogerson, (1994) 53 *CLJ* 241.

[241] 1992 SLT 268.

[242] See e.g. *National Mutual Holdings Pty Ltd* v. *Sentry Corporation* (1989) 87 ALR 539.

[243] *Djoni Widjaja* v. *Bank of America National Trust and Savings Association* [1993] 3 SLR 678.

[244] (1993) 102 DLR (4th) 96.

[245] See *Laker Airways Ltd* v. *Pan American World Airways*, 559 F. Supp 1124, 1129 (DDC 1983).

This doctrine is the same in many respects as the English one. Different criteria are applied for restraining foreign proceedings from those adopted for a stay of local proceedings. Likewise, comity is an important consideration, and an injunction will not lightly be granted. It is not enough to base the injunction on simple convenience; the foreign action must be shown to be frivolous or vexatious. Under both United States and English law, bringing an action abroad in breach of a valid choice of jurisdiction clause is in itself likely to lead to an injunction restraining the foreign proceedings.[246] On the other hand, in the United States the public interest must be taken into account. There is a difference, too, in the role that the doctrine of restraining foreign proceedings plays in the United States when compared to its role in other common law jurisdictions. The doctrine is seen in the United States as the prime method of stopping parallel proceedings.[247] Finally, an English court will, in rare cases, grant an injunction even though the substantive issue can only be decided by the foreign court.[248] An American court will not.[249]

(c) QUEBEC

In Quebec the criteria for restraining foreign proceedings are not entirely clear, but appear to be based on case law and to be similar to, but not identical with, the Quebecois *forum non conveniens* criteria. Two key elements under both sets of criteria are the general balance of inconveniences and abuses of procedure. As a result, a court could, using these criteria, reject a plea of *forum non conveniens* by one party but grant an injunction restraining the foreign proceedings in favour of the other party. In practice though, the power to grant an injunction restraining foreign proceedings has been very rarely used. The problem of forum-shopping has been dealt with at the stage of recognition of the judgment.

(d) JAPAN

There is a lack of Japanese case law on this topic. However, it is suggested[250] that it is in theory possible for a Japanese court to order someone not to continue to litigate in a foreign State, although the criteria to be adopted when deciding whether to make such an order are not clear.

[246] For the US see below, p. 425. For England see *Sohio Supply Co* v. *Gatoil (USA) Inc* [1989] 1 Lloyd's Rep. 588 (CA). For the situation where there is an arbitration agreement see *The Angelic Grace* [1994] 1 Lloyd's Rep. 168.

[247] See below, p. 418.

[248] See e.g. *Midland Bank plc* v. *Laker Airways Ltd* [1986] QB 689 (CA).

[249] See Hartley, (1987) 35 *Am. J Comp. Law* 487.

[250] See below, p. 318.

3. Refusing to Recognize and Enforce the Foreign Judgment

(a) the underlying theory

The adoption of very narrow and restrictive rules on the recognition and enforcement of foreign judgments acts to discourage forum-shopping abroad. If there is little or no connection with the foreign place of trial there may also be a problem of enforcing the judgment in that State, and a successful plaintiff may have to seek enforcement abroad. Some States refuse to recognize or enforce foreign judgments altogether in the absence of a treaty obligation. Many other States require a strong connection with the judgment-granting State. This means necessarily that recognition and enforcement will not be accorded to a foreign judgment where this has been obtained as a result of forum-shopping.

This approach is not entirely satisfactory as a means of stopping forum-shopping abroad, since it may be possible for a plaintiff who has been forum-shopping abroad to find assets in the judgment-granting State or to enforce the judgment in some other State which has wide rules on recognition and enforcement of foreign judgments. Nor does this method stop parallel proceedings, while restraining foreign proceedings does. There are, though, the rules on *lis alibi pendens* to stop parallel proceedings.

(b) states adopting this approach

In France, Germany, and Switzerland the rules on recognition and enforcement of foreign judgments are seen as being the means of dealing with forum-shopping abroad in an incompetent forum. None of these States has adopted a doctrine of *forum non conveniens*, and, accordingly, one would not expect them to adopt a discretionary power to restrain foreign proceedings. More interestingly, each of these States uses a recognition prognosis to deal with problems of *lis alibi pendens*, at least in cases outside the Brussels and Lugano Conventions. The French, German, and Swiss reporters see the requirement that the foreign court must have indirect jurisdiction as the most important provision on recognition and enforcement when it comes to dealing with forum-shopping abroad. Under French law, for recognition and enforcement of a foreign judgment it is also required that the French courts did not have exclusive jurisdiction.[251] French law is particularly opposed to the power to restrain foreign proceedings, seeing this as an intolerable interference with the foreign court.

[251] Cass. Fr., lère ch. civ., 6 Feb. 1985, [1985] *Simitch, Rev. crit. de dr. internat. pr.* 369 with art. by Ph. Francescakis, at 243; [1985] *Journal du droit international* 460, note A. Huet; [1985] Dalloz 469, note Massip, and report at 497, observ. Audit; Ancel and Lequette, *Grands arrêts de la jurisprudence française de droit international privé*, n. 171 above, n°. 66.

In Sweden and Finland foreign judgments are normally unenforceable and forum-shopping abroad is seen as being pointless. In these two States there are also suggestions that a recognition prognosis should be used to deal with *lis pendens*.

Italian law provides litigants with a particularly potent weapon, which could be used to deal with forum-shopping abroad, in that the mere institution of proceedings in Italy, before a foreign judgment becomes final, effectively prevents recognition of the foreign judgment there.[252]

Even in States which have a power to restrain foreign proceedings, the question of enforcement of the foreign judgment does have some relevance. Thus in the United States, there is a tendency in commercial cases to let the parallel proceedings continue and refuse to restrain the foreign proceedings, in the knowledge that the rules on enforcement deny this to a foreign judgment which is irreconcilable with a judgment granted in the United States.

Under Quebecois law, it is accepted that certain of the rules on recognition and enforcement (e.g. the public policy rule) could be used to stop forum-shopping abroad. Moreover, the rules on recognition and enforcement contained in the Civil Code may be regarded as being formulated so as to control forum-shopping. A foreign court's jurisdiction is only recognized 'to the extent that the dispute is substantially connected with the country whose authority is seised of the case'.[253] Elsewhere in Canada, in the common law jurisdictions, the rules on the recognition and enforcement of foreign judgments are such that the judgment of a foreign State which is *forum non conveniens* is unlikely to be recognized.

VIII
CONCLUSIONS

1. By and large, States share the same concerns. If local courts are to try the case, this should be on the basis that the local forum is the appropriate, or an appropriate, one for trial. Parallel proceedings at home and abroad are undesirable and should not be allowed to continue. Effect should be given to the wishes of the parties as set out in choice of jurisdiction and arbitration clauses. Trial abroad in an unconnected foreign forum is a matter of concern to a local forum.

2. Common law jurisdictions deal with these concerns by means of discretionary rules, not only in relation to declining jurisdiction under the doctrine of *forum non conveniens* but also in relation to *lis pendens*, choice of jurisdiction agreements, (in limited circumstances) arbitration agree-

[252] Art. 797(1), n°. 6, Code of Civil Procedure. [253] Art. 3164.

ments, forum-shopping abroad, and restraining foreign proceedings. In marked contrast, civil law jurisdictions show a consistent pattern of using non-discretionary rules in relation to all these areas of concern. The hybrid jurisdiction of Quebec adopts a mixture of approaches for, while it has a doctrine of *forum non conveniens*, in cases of *lis pendens* resort may be had to a (non-discretionary) recognition prognosis approach.

3. There is a group of States (France, Germany, Italy, Switzerland, Sweden, and Finland), which see the answer to at least some of these concerns in terms of rules on recognition and enforcement of foreign judgments. Thus it is the same States that use a recognition prognosis in cases of *lis pendens*, as use restrictive rules on recognition and enforcement of foreign judgments to discourage forum-shopping abroad.

4. When it comes to *forum non conveniens*, there is a major dichotomy between States which have such a doctrine, and this is not always precisely the same doctrine, and those which do not. Perhaps the most important single reason for this dichotomy can be found in the relationship between the concepts of *forum conveniens* and *forum non conveniens*. Many States do not have a doctrine of *forum non conveniens* because of their perception that they only have jurisdiction in the first place when the local forum is *forum conveniens*. Conversely, in common law jurisdictions the power to decline to exercise jurisdiction on the basis of *forum non conveniens* is used when the jurisdiction that undoubtedly exists is not based on *forum conveniens*.

5. As regards *lis pendens*, there is general agreement that, in certain circumstances, this should be dealt with by declining jurisdiction or by suspending local proceedings. The major exception is the United States where the solution to the problem is seen in terms of restraining the foreign proceedings. However, there is no agreement on the basis for declining jurisdiction/suspending local proceedings. This may be on the basis of *forum non conveniens*, or a mechanical rule which gives priority to the State which is first seised of the proceedings, or a recognition prognosis. Common law jurisdictions (with the exception of the United States) favour the first basis. With non-common law jurisdictions, though, there is no clear pattern. Thus many civil law States, while often adhering to a recognition prognosis, may also take into account the matter of which court was first seised of the proceedings (thus combining the two approaches). At the same time, civil and common law jurisdictions in Western Europe in Brussels/Lugano Convention cases will only apply the first-seised rule.

6. With foreign choice of jurisdiction agreements there is much more uniformity of approach than with *lis pendens*. There is a consensus among States that effect should be given to the wishes of the parties and that the local forum should not try the case. This may involve declining jurisdiction (in common law jurisdictions) or acknowledging that there is no

jurisdiction (in civil law jurisdictions), but the result will be the same. Of course, common law jurisdictions do have a power not to decline jurisdiction but, instead, to allow trial to continue despite the presence of a foreign choice of jurisdiction agreement. However, as a general rule jurisdiction is declined in this situation.

7. There is even more uniformity of approach among States when it comes to arbitration agreements. Jurisdiction must be declined in cases where there is a valid arbitration agreement. This uniformity comes about because of the influence of the New York Convention and the UNCITRAL Model Law. The result is that even common law jurisdictions operate a mandatory rule requiring them to decline jurisdiction, rather than a discretionary rule, in cases coming within the Convention or Model Law.

8. When it comes to forum-shopping abroad the fundamental difference in approach between common law and other jurisdictions in relation to discretionary powers resurfaces. For it is only in the common law jurisdictions that the courts have a discretionary power to restrain foreign proceedings. In fact, the adoption of this power is less widespread than the adoption of the doctrine of *forum non conveniens*. Thus Japan, while having a 'special circumstances' doctrine which bears a resemblance to a doctrine of *forum non conveniens*, has no power to restrain foreign proceedings. In this State, as in other non-common law jurisdictions, the problem of actions being brought in an unconnected forum abroad is dealt with at the stage of recognition and enforcement of the ensuing judgment.

9. Multilateral conventions have had a considerable impact on this whole area. The conventions in question have not been Hague Conventions on Private International Law,[254] which, so far, have had very little direct impact in this area; they are the New York Convention and the Brussels/Lugano Conventions.[255] The impact of the former has already been mentioned. The latter have harmonized the law for Western European States, not only in relation to *forum non conveniens* (the Conventions contain no *forum non conveniens* provision), but also in relation to *lis pendens* and foreign choice of jurisdiction clauses. The impact of the Brussels and Lugano Conventions has been most profound on the United Kingdom, where implementation of these Conventions, which are based on civil law concepts, has meant the loss of discretionary powers in cases coming within them.[256]

[254] i.e. the Hague Convention on the choice of court, concluded in 1965 (which has never come into force); the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, concluded in 1971 (ratified by Cyprus, The Netherlands, and Portugal).

[255] However, the work of the Hague Conference has had a considerable impact on the development of the Brussels Convention. See Arts. 1, 2, 5(2), 17, 20 of the Brussels Convention, and the Jenard Report, [1979] OJ C59/1.

[256] This is subject to *Re Harrods (Buenos Aires) Ltd*, n. 37 above.

Recent developments at the Hague Conference on Private International Law raise the possibility of a multilateral convention which could have an equally profound effect on *forum non conveniens, lis pendens,* and related rules in any State throughout the world which ratifies it. Following the Seventeenth Session of the Hague Conference on private international law, a Special Commission met in June 1994[257] which concluded that it would be advantageous to draw up a convention on jurisdiction, recognition, and enforcement of foreign judgments in civil and commercial matters. The Special Commission agreed that this convention should establish rules on judicial jurisdiction at the stage of the initial litigation. There was much discussion whether a judge who has jurisdiction should be able to decline this on the basis of *forum non conveniens*. This was bound to be a difficult matter, given the clear dichotomy between States which have such a doctrine and those that do not. However, it seems that there is a possibility of a compromise being reached:

> allowing a limited possibility for application of the theory of *forum non conveniens* in specific cases to be determined and on the condition that a mechanism of co-ordination be instituted in the convention. The essence of this mechanism would be that, where the court of a Contracting State considers that the court of another Contracting State is better placed than it is to judge the case pending before it, under circumstances which might be set out in the convention, it would stay proceedings before it until that other court has declared itself to have jurisdiction. If this second court refuses to exercise jurisdiction, the first court would then have to decide the case on the merits.[258]

This opens up the possibility not only of common law jurisdictions using a new and more limited doctrine of *forum non conveniens* but also, more interestingly, of civil law jurisdictions operating a doctrine of *forum non conveniens* when this has not hitherto been the case. The proposed convention would also deal with the problem of *lis pendens,* thereby producing a measure of harmonization in an area which is well known for the variety of different solutions to the problem.

[257] See *Conclusions of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,* Prelim. Doc. No. 1 of Aug. 1994 for the attention of the Special Commission on general affairs and policy of the Conference.

[258] *Ibid.* 21.